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No. _____

COA No. 62402-4-I

CLERK

SUPREME COURT OF THE STATE OF WASHINGTON

PERRY MILLS,

Appellant,

v.

WESTERN WASHINGTON UNIVERSITY,

Respondent.

**ANSWER TO PETITION FOR REVIEW AND
CROSS-PETITION FOR REVIEW**

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ORIGINAL

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I. IDENTITY OF RESPONDENT/CROSS-APPELLANT

Western Washington University (WWU) is the Respondent to Appellant Mills's Petition for Review in this appeal from the decision of the Division I Court of Appeals. WWU is the Cross-Appellant from the decision in connection with the remand ordered, seeking review under RAP 13.4(b)(1) and (4).

II. COURT OF APPEALS DECISION

WWU seeks review of the part of the decision of the Court of Appeals in *Mills v. Western Washington University*, 150 Wn. App. 260, 208 P.3d 13 (2009), wherein the Court determined that WWU failed to comply with the Administrative Procedure Act (APA) in its conduct of the disciplinary hearing in closed session, in compliance with the WWU *Faculty Handbook*. The Court remanded for the conduct of a disciplinary hearing open to the public.

WWU does not appeal from the first three sections of the decision, which Mills seeks to have overturned.

A copy of the decision is attached hereto as Appendix A. Respondent and Appellant filed timely motions for reconsideration which were denied on June 24, 2009. A copy of the order denying Respondent's motion for reconsideration is attached hereto as Appendix B. A copy of

the order denying Appellant's motion for reconsideration is attached hereto as Appendix C.

WWU seeks review of the Court of Appeals decision pertaining to the conduct of the disciplinary hearing in closed session. WWU seeks Supreme Court review under RAP 13.4(b)(1), asserting that the Court of Appeals decision conflicts with two decisions of the Supreme Court: *Densley v. Dep't of Retirement Systems*, 162 Wn.2d 210, 226, 173 P.3d 885 (2007), wherein the Court notes that the APA requires an appellant show substantial injury to justify relief, which the Court of Appeals failed to do; and *McDonald v. Hogness*, 92 Wn.2d 431, 446, 598 P.2d 707 (1979), where the Court held that categories of university rules did not need to be promulgated under the [former] Higher Education Administrative Procedure Act. Further, the decision creates an issue of substantial public interest in that remand for public hearing of a faculty disciplinary matter conducted with scrupulous adherence to rules, by reversing and remanding for failure to conduct the hearing in open session. This issue provides basis for the Supreme Court to accept review under RAP 13.4(b)(4): If the petition involves an issue of substantial public interest that should be determined by the Supreme Court, review should be granted.

III. ISSUES PRESENTED FOR REVIEW

1. Under RCW 34.05.449(5), administrative hearings may be closed pursuant to applicable rules and provisions of law. The rules for faculty disciplinary hearings promulgated by WWU stated that hearings must be closed. Did the Court of Appeals err in ruling that disciplinary hearings must be open?
2. Under RCW 34.05.570(1)(d), and this Court's decision in *Densley v. Dep't of Retirement Systems*, a petitioner must show substantial prejudice in order to prevail. Did the Court of Appeals err in allowing Mills to prevail, despite the absence of prejudice?

IV. STATEMENT OF THE CASE

The Court of Appeals decision concisely captured the proceedings at WWU. WWU does not take issue with its description of Mills's serious abusive behaviors towards others, its analyses of his claims, or its conclusions related to the claims, other than the issue of the conduct of the hearing in closed session, which the Court labeled as "secret." Mills had not challenged the findings of fact below; thus, they are verities on appeal.

In 1998, tenured Assistant Professor Mills applied for and was denied promotion to full professor. CP 1462, Final Order at 22, FF 69. [Then] Chair Ward recommended against promotion, describing Mills's berating, belittling, and mistreatment of colleagues and students; Mills was put on notice that his behavior was unacceptable. CP 1460, 1462, Final Order at 20, 22, FF 64, 69.

In Fall 2000, Mills received a written memorandum from [then] Chair Kuntz, admonishing Mills for verbally abusing students and staff with profanities and threats, threatening to kill administrators and others he disapproved of, and carrying weapons on campus prohibited under WWU's rules. CP 1461, Final Order at 21, FF 65. Further, Kuntz informed Mills that the *Faculty Handbook* required faculty to adhere to the Code of Faculty Ethics, and warned Mills his behavior must change. CP 1461, Final Order at 21, FF 65. Mills disregarded the admonishment and warning. That same fall, Deborah Currier came to WWU as an untenured lecturer in the Theatre Arts Department. CP 1445, Final Order at 5, FF 13. On Currier's first day of work, Mills told her that she had better keep her legs closed because she could not be expected to teach students the same way she got her doctoral degree. CP 1445, Final Order at 5, FF 13. Over the next two years, Mills repeatedly attacked Currier in the workplace, calling her a "bimbo," a "slut," and on one occasion, a "cunt." CP 1445, Final Order at 5, FF 13. Currier learned that Mills also used sexually derogatory terms about her when speaking to students outside Currier's presence. CP 1445, Final Order at 5, FF 13.

In September 2001, department faculty lodged a complaint with [then] Dean van Boer expressing their "real and tangible fear" occasioned by Mills carrying a firearm and large knife on campus, together with

belligerent rants about killing people who offended him; Dean van Boer warned Mills that he should not carry weapons on campus. CP 1455, Final Order at 15, FF 48.

Mills verbally attacked Department Secretary Reddell over a period of several years, referring to her as a “stupid bitch.” CP 1447, Final Order at 7, FF 20. Mills’s verbal abuse extended to male colleagues as well. In Fall 1997, shortly after being hired, Gregory Pulver was called “just a stupid faggot” by Mills. CP 1446, Final Order at 6, FF 16. Pulver’s years of verbal abuse from Mills caused him to feel fearful and unsafe in the workplace, causing him to lodge a written complaint with Dean Edwards. CP 1447, Final Order at 7, FF 18.

Mills often used obscenities and derogatory language directed at or concerning students. CP 1456, Final Order at 16, FF 51. Currier heard Mills refer to various students as “shit for brains,” “blondies,” and one overweight student as “a 400-pound canary who warbles nothingness” and “makes him sick.” CP 1456, Final Order at 16, FF 50. Students feared reprisal from Mills, seeking to have their complaints left in confidence. CP 1458-59, Final Order at 18-19, FF 57-59.

A student returning from ovarian cancer treatment in Spring 2004 lodged a complaint at the beginning of Fall 2004; she related that in the Spring, she was not fully recovered, had lost her hair, and was hesitant to

make a presentation in Mills's class. CP 1452, Final Order at 12, FF 37. Mills testified that he told her if she did not put up her work, "then you should have just died of cancer." CP 1452, Final Order at 12, FF 37. Only when the course was over did she file a written complaint. CP 1452, Final Order at 12, FF 36-38.

In early October 2004, Provost Bodman received a number of complaints regarding Mills's verbal abusive treatment of faculty, staff, and students, along with charges regarding brandishing a large knife in a classroom; Mills was placed on suspension with pay. CP 1442, 1454-55, Final Order at 14-15, FF 2 and 43-48. Pre-disciplinary steps were followed that academic year, culminating in formal charges filed in June 2005. CP 1443, Final Order at 3, FF 4.

In October 2005, Hearing Officer Robert Alsdorf convened the formal hearing, which was held before a five-faculty member panel pursuant to procedures set forth in the WWU *Faculty Handbook*. CP 1443, Final Order at 3, FF 5-6. Those procedures were adhered to; no reference or reliance was made on procedures for hearing in the APA as are found at RCW 34.05.559.

Mills requested the hearing be held in open session. The Faculty Hearing Panel heard argument on the matter. The *Faculty Handbook* states:

The hearing will be private, unless the Hearing Panel, in consultation with the Provost and only with the agreement of the faculty member, decides that the hearing should be public.

Faculty Handbook, XVII.2.d., Agency Record. The Faculty Hearing Panel ruled it be conducted in private. Mills did not seek court review of that decision at that time.

After a multi-day hearing, the Faculty Hearing Panel issued a recommended decision and proposed findings, determining that Mills had verbally abused faculty, staff, and students over a series of years, justifying imposition of serious discipline, and recommending two quarters' disciplinary suspension without pay. Appeals were lodged with the President of the University, who upheld the decision and added elements to the sanctions. Mills appealed to the Board of Trustees. The Provost sought Mills's dismissal.

On October 27, 2006, the Board of Trustees issued its 49-page final decision, imposing two quarters' disciplinary suspension without pay and ordering a range of other measures in an effort to reform Mills's behavior. *See* Appendix D.

On November 28, 2006, Mills petitioned for review in Whatcom County Superior Court under the Administrative Procedure Act,

RCW 34.05.514. He did not seek a stay of enforcement from the Board of Trustees nor from the superior court.

Mills was placed on disciplinary suspension without pay Winter and Spring Quarters 2007. In April 2007, WWU noted the matter for trial. The administrative appeal was heard by Judge Steven Mura on November 21, 2007. On December 27, 2007, Judge Mura entered his order affirming the decision of the Board of Trustees. Mills timely filed a Notice of Appeal in Whatcom County Superior Court on January 18, 2008, seeking review in this Court. The Supreme Court denied review on October 3, 2008, remanding the case to the Court of Appeals. The Court of Appeals issued its decision on May 26, 2009, and denied motions for reconsideration from both parties on June 24, 2009.

V. REASONS WHY APPELLANT'S REQUEST FOR REVIEW SHOULD BE DENIED

The Court of Appeals' conclusion that the faculty code of ethics was not unconstitutionally vague does not conflict with any decision of this Court or the Court of Appeals. Mills's abusive treatment of others is undisputed. Mills is disingenuous in his claims otherwise. As the Court of Appeals noted in *Simmons v. Vancouver Sch. Dist. No. 37*, 41 Wn. App. 365, 380, 704 P.2d 648 (1985), an otherwise vague standard will nonetheless be considered constitutional if the party to whom it is applied

is given actual notice of the type of conduct that may later result in discipline. Given that Mills had been warned in 1998, 2000, 2001, and 2003 that his abusive treatment of others in the academic setting was not acceptable and could result in discipline, and told in writing in 2000 that his conduct was unacceptable under the Code of Faculty Ethics, this threshold was met.

Mills contends that his First Amendment Free Speech Rights and Academic Freedom were violated through the discipline imposed, claiming that his words toward the student returning from cancer treatment were intended to spur her towards classroom participation. The Court of Appeals properly considered and applied the decisions in *Stastny v. Bd. of Trustees of Cent. Wash. Univ.*, 32 Wn. App. 239, 254, 647 P.2d 496 (1982), *rev. denied*, 98 Wn.2d 1001 (1982) and *cert. denied*, 460 U.S. 1071 (1983); and *Sinnott v. Skagit Valley Coll.*, 49 Wn. App. 878, 881, 746 P.2d 1213 (1987), *rev. denied*, 110 Wn.2d 1010 (1988). The vast majority of the conduct for which Mills was disciplined was outside of the classroom, entirely unrelated to any pedagogical purpose and thus was not protected speech. As the Court of Appeals stated, it is “well established that because the ‘vagueness doctrine is based on fair notice that certain conduct puts persons at risk of discharge[,] . . . standards are not void for vagueness as long as ordinary persons using ordinary common sense

would be notified that certain conduct will put them at risk.” *Mills*, 150 Wn. App. at 273, quoting *San Filippo v. Bongiovanni*, 961 F.2d 1125, 1136 (3rd Cir. 1992) (citing *Arnett v. Kennedy*, 416 U.S. 134, 159, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974)).

The Court of Appeals properly applied the decisions of this state, holding that academic freedom is not a license for destructive behavior that disrupts the educational process and functioning of the university. *Mills*, 150 Wn. App. at 273-74, citing *Stastny*, 32 Wn. App. at 249-50 and *Sinnott*, 49 Wn. App. at 881. The case law of this state, as well as that of the federal courts, consistently supports the Court of Appeals’ ruling that academic freedom does not include the right to verbally abuse others.

VI. REASONS WHY RESPONDENT’S CROSS-PETITION FOR REVIEW SHOULD BE GRANTED

A. The Court of Appeals’ Holding Regarding Closed Session Hearings Conflicts With RCW 34.05.010(16), RCW 34.05.449(5), And Rules Adopted Pursuant to RCW 28B.10.648.

RCW 34.05.449(5) provides that administrative hearings are open to the public, “except for the parts that the presiding officer states to be closed under a provision of law expressly authorizing closure or under a protective order entered . . . pursuant to applicable rules. . . .” The Court of Appeals incorrectly held that the University had not properly enacted a rule which would permit closure. On the contrary, *WWU Faculty*

Handbook procedures were duly enacted by the Board of Trustees on recommendation of the faculty and were made part of the record of the proceedings, adhered to and referenced throughout by Hearing Officer Alsdorf. The Court of Appeals' ruling conflicts with the plain language of the APA, the former APA, and the Higher Education Administrative Procedure Act, which all explicitly exempt institutions of higher education from the rule-making requirements of the APA. Further, and most importantly, RCW 28B.10.648(2) states: "(2) Peer review proceedings shall be pursuant to rules and regulations promulgated by the respective institutions of higher education." The broad implications of the Court's published decision impact all of Washington's institutions of higher education.

RCW 34.05.010(16) defines the word "rule," and specifically states that as used in the APA, the term excludes:

(iv) rules of institutions of higher education involving standards of admission, academic advancement, academic credit, graduation and the granting of degrees, employment relationships, or fiscal processes.

Id. (emphasis added). This longstanding statutory exemption was also present in the prior version of the APA, RCW 34.04.010, and in the prior version of the Higher Education Administrative Procedure Act, [former] RCW 28B.19.020(2). See W. Andersen, *The 1988 Washington*

Administrative Procedure Act – An Introduction, 64 Wash. L. Rev. 781, 790-91 (1989).

The Higher Education Administrative Procedure Act, enacted in 1971, contains a nearly identical definition of the term rule. Laws of 1971, 1st Ex. Sess., ch. 57. [Former] RCW 28B.19.020(2) states, in relevant part:

... **The term** includes the amendment or repeal of a prior rule but **does not includes rules, regulations,** order, statements, or policies **relating primarily to** the following: Standards for admission; academic advancement, academic credits, graduation and the granting of degrees; tuition and fees, scholarships, financial aids, and similar academic matters; **employment relationships;** fiscal processes; or matters concerning only the internal management of an institution and not affecting private rights or procedures available to the general public; and such matter need not be established by rule adopted under this chapter unless otherwise required by law.

As the state Supreme Court has recognized, [former] RCW 28B.19 exempts state higher education institutions from rule-making provisions, including notice and publication requirements. *McDonald*, 92 Wn.2d at 446. The Court in *McDonald* noted that although the institutions are exempt from rule-making requirements, judicial review ensures that action taken by a higher education institution is not arbitrary or capricious. *See id.* RCW 28B.10.648, enacted in 1984, states, in relevant part:

(2) Peer review proceedings shall be pursuant to rules and regulations promulgated by the respective institutions of higher education.

(3) . . . In the case of a disciplinary or dismissal proceeding, a statement of reasons shall be provided by the reviewing committee to the evaluated person for any decision unfavorable to such person.

The Faculty Hearing Panel and Board of Trustees properly concluded that the *Faculty Handbook* and its provisions constituted a “provision of law” authorizing the hearing process and its closure without a protective order.

The Court of Appeals decision incorrectly terms the *Faculty Handbook* as something other than a “provision of law,” categorizing it a “private contract” between Mills and the University. As stated above, there is no statutory requirement that an institution of higher education place its rules on employment relations in WAC Rules. On the contrary, as the state Supreme Court has recognized, the plain language of both the APA and the Higher Education Administrative Procedure Act explicitly exempt institutions of higher education from WAC rule-making requirements on the listed topics. The consequence of following the rules should not be a remand.

This ruling is in conflict with the Supreme Court’s ruling in *McDonald*. The Supreme Court is therefore urged to accept review under RAP 13.4(b)(1).

B. The Granting of Relief to Mills, Absent Showing Of Any Substantial Injury, Conflicts With RCW 34.05.570(3)(c).

The Court of Appeals noted in its decision, on page 7, “Under the Administrative Procedure Act, relief from a final agency decision is appropriate only if the decision ‘is in violation of constitutional provisions on its face or as applied’; ‘[t]he agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure’;” The Court determined that the University engaged in unlawful procedure by using its duly enacted *Faculty Handbook*, which the Court found to be in violation of RCW 34.05.449(5), requiring the Court to conclude that RCW 34.05.570(3)(c) requires granting Mills relief. The University asserts that such should not be the case.

In fashioning its relief, the Court fails to address the requirement set out in RCW 34.05.570(1)(d), which states: “The court *shall* grant relief *only* if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.”

The Court of Appeals’ holding that Mr. Mills need not show prejudice for procedural violations is contrary to the Supreme Court’s holding in *Densley v. Dep’t of Retirement Systems*, 162 Wn.2d 210, 226, 173 P.3d 885 (2007):

Densley also claims that the entire final order of the presiding officer should be reversed, due to certain alleged

improprieties in the administrative review process. This claim, in our judgment, is entirely without merit. Densley points out that, under the APA, a reviewing court may “set aside agency action” and “order an agency to take action required by law” or “to exercise discretion required by law,” when “[t]he agency...has failed to follow a prescribed procedure.” RCW 34.05.574(1), .570(3)(c). However, as noted above, we can grant such relief only if Densley “has been substantially prejudiced by the action complained of.” RCW 34.05.570(1)(d). Densley does not explain how he has been substantially prejudiced. Instead, he incorrectly claims there is no requirement to show prejudice.

Appellant urged remand in his brief to the Supreme Court for two reasons: One, to allow Mills to publicly air his allegations regarding his (former) chair¹; and two, to allow the “absolute right of the public to observe” such hearings (Appellant’s Petition for Review to the Supreme Court, p. 31). Neither of these assertions speaks to any claim of substantial injury that Mills may have suffered by having the hearing conducted in closed session.

The Court of Appeals’ ruling is in conflict with the Supreme Court’s ruling in *Densley*. The Supreme Court is therefore urged to accept review under RAP 13.4(b)(1).

¹ The Board of Trustees specifically determined that Mills’s claims lacked basis and concluded that Mills made the false statements to others knowing them to be false or with reckless indifference, concluding that Mills expressly intended to injure the reputation of his former chair. Findings and Conclusions, p. 9-10, Conclusions of Law, p. 33, October 27, 2006 Review Decision and Final Order of the Board of Trustees.

C. The Court's Order Of Remand Is Impractical With Respect To The Applicable Process On Remand.

Academic employment relations at the University are no longer subject to the *Faculty Handbook*. Effective June 2008, a collective bargaining agreement (CBA) went into effect, bargained pursuant to Chapter 41.76 RCW. That agreement provides for a jointly appointed hearing committee to conduct a disciplinary hearing which "shall be private" from which a final and binding decision is issued. Appendix E, *Collective Bargaining Agreement Between WWU and United Faculty of WWU*, p. 35-37. Remand of this matter for an open APA hearing under the now-repealed provisions of the *Faculty Handbook* would serve no purpose. Under the current collective bargaining agreement, remand is impracticable.

RCW 34.05.574 states, in relevant part:

(1) In a review under RCW 34.05.570, the court may (a) affirm the agency action or (b) order an agency to take action required by law, order an agency to exercise discretion required by law, set aside agency action, enjoin or stay the agency action, remand the matter for further proceedings, or enter a declaratory judgment order. . . . In reviewing matters within agency discretion, the court shall limit its function to assuring that the agency has exercised its discretion in accordance with law, and shall not itself undertake to exercise the discretion that the legislature has placed in the agency. The court shall remand to the agency for modification of agency action, **unless remand is impracticable** or would cause unnecessary delay.

The University has extended to Mr. Mills all procedural rights and benefits owing him under the terms of the *Faculty Handbook* during the course of these proceedings. His tenured status guaranteed certain and extensive due process prior to imposition of disciplinary sanction. The due process to which he was entitled occurred. His discipline should stand. The Board of Trustees struggled with the discipline to impose on Mr. Mills. The Hearing Panel recommended two quarters' suspension without pay, a requirement that Mills agreed to abide by the Code of Faculty Ethics, and some other actions. The Board remanded the matter to the Faculty Hearing Panel to reconsider the sanctions recommended, given that the Board formed the view that termination was justified. The Faculty Hearing Panel reconsidered and stood by its recommendation, which the Board of Trustees reluctantly followed.

Here we are nearly two years later, and Mills continues to assert that his treatment of others was protected speech, and forcefully asserts that his behavior was acceptable.

Institutions of higher education, both community colleges and universities, have had academic personnel systems in place for many years. The community colleges came into being in 1977. The state universities have existed in various forms since the 1880's-90's. They had academic personnel rules and procedures in place prior to the enactment of

the Higher Education Administrative Procedure Act and the APA. The Court of Appeals' ruling in this case has cast into confusion the ability of those institutions to engage in either collaborative rule-making outside the APA or collective bargaining, to provide for the shape and process to be followed in peer review matters.

VII. CONCLUSION

WWU urges the Supreme Court to deny Appellant's Petition for Review. WWU respectfully requests the Supreme Court to grant Respondent's Cross-Petition for Review under the authority of RAP 13.4(b)(1) and (4).

VIII. COST BILL

As of this date, the Court of Appeals Commissioner has yet to rule on the cost bill submitted by Mills, to which WWU had replied. WWU reserves the right to seek review of that order.

RESPECTFULLY SUBMITTED this 18th day of August, 2009.

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APPENDIX A

PERRY MILLS,

v.

Respondent.

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¹ Chapter 34.05 RCW.

Ethics—his violation of which provided the basis for his suspension—is unconstitutionally vague, (3) his suspension violated his constitutional free speech rights, and (4) the hearing closure was unlawful. We hold that the University did not violate Mills's employment contract, that the Faculty Code of Ethics is not unconstitutionally vague, and that the University did not violate Mills's free speech rights. However, we also hold that the University violated the Administrative Procedure Act by conducting Mills's disciplinary hearing in secret. Accordingly, we vacate the University's Final Order and remand to the University for a new hearing.

Mills has taught in the University's Theatre Arts department for more than 20 years.² He received tenure in 1994. Final Order at 2. Soon thereafter, complaints about his conduct began surfacing.

In 1998-99, Mills was denied promotion to the rank of full professor. The Theatre Arts department chair at the time recommended against the promotion, citing behavior by Mills including: "using foul language with and toward students, employing a combative teaching style, discussing other faculty members with students in a derogatory and demeaning manner, enjoying his wit at the expense of students, . . . berating and demeaning students in the guise of humor," causing "an extremely high student complaint rate," and "berating and demeaning colleagues in the guise of humor." Final Order at 21.

² The facts stated are adapted from the Findings of Fact of the University's Board of Trustees' Review Decision and Final Order. Mills has not assigned error to the Board's findings. Accordingly, they are treated as verities on appeal. Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 407, 858 P.2d 494 (1993). For convenience, citations are to this "Final Order."

In 2000, new department chair Mark Kuntz admonished Mills for making demeaning comments toward and about women, gay students, and minorities. Final Order at 21. Slightly less than a year later, Kuntz again formally admonished Mills, stating, "Your repeated need to express your desire to 'kill' people is not appropriate, and will stop . . . Your lack of sensitivity or care about the needs of students, staff, and colleagues must stop." Final Order at 21.

That same year, in response to student complaints, Kuntz admonished Mills for brandishing a knife in class. Final Order at 15. Less than a year later, members of the department's faculty and staff wrote a letter to the dean of the department's college expressing their "'real and tangible fear' occasioned by Mills's carrying of a registered firearm and a large knife on campus and in the classroom, together with his belligerent rants about killing people who offended him." The dean admonished Mills in response to this complaint. Final Order at 15.

These communications had little, if any, effect on Mills's behavior. On the first day that a new professor, Deborah Geer Currier, commenced working in the department in the fall of 2001, Mills told her that "she had better keep her legs closed, because she could not be expected to teach students the same way she got her doctorate." Final Order at 5. Mills repeatedly called her, in the workplace and to her face, "bimbo," "slut," and, on one occasion, "cunt." Currier took Mills's abuse in silence until she secured a tenure-track position. She then informed Mills that she would not tolerate further sexual innuendo directed at

her, and Mills ceased verbally abusing her to her face. Final Order at 5.

During another conversation with a faculty member in the first year of employment with the department, Gregory Pulver, Mills referred to him as "just a stupid faggot." Pulver informed Mills that his behavior was unacceptable. Again, Mills ceased insulting Pulver to his face. Instead, he began referring to Pulver behind his back as "Precious" in a lilting manner that mocked Pulver's sexual orientation, both to students and to colleagues. According to Pulver, he felt unsafe around Mills and avoided him whenever possible. Final Order at 6-7.

Mills did not limit his verbal abuse to other faculty members. For years, Mills called the department's administrative assistant, Kay Redell, a variety of derogatory names. For example, he was overheard telling her, "You're just a stupid bitch. You're just white trailer trash." Final Order at 7. Both Currier and Pulver stated that they frequently observed Redell to be "incredibly upset," "distraught," and "shaken" following such exchanges with Mills. Final Order at 7.

Mills also verbally abused students. For instance, inside the classroom, he referred to students (mostly female) as "shit for brains," "blondies," and "fucking lazy girl[s]." On one occasion, he referred to an overweight female student as "a 400-pound canary who warbles nothingness" and "makes him sick." Final Order at 16. Outside the classroom, Kuntz once overheard Mills berating a student library assistant, screaming, "You bitch, you screwed up," and, to her supervisor, "Is she retarded?" Final Order at 17.

Both Currier and Pulver stated that it was common for students to come to

them in tears due to verbal abuse by Mills. Because of Mills's seniority in the department, Pulver limited himself to recommending that gay students "sit in the back and keep quiet," and request waivers from Mills's courses. Pulver found it "nauseating" to have to give students such advice. Final Order at 16.

In 2004, Mills again displayed a knife in class, drawing an official complaint from a student who felt unsafe in his presence. Final Order at 14.

That same year, a student who had been undergoing treatment for cancer enrolled in Mills's dramatic writing class, a requirement for her major. When the class began, she was not yet fully recovered and was still bald from chemotherapy. In response to a request from Mills, she initially volunteered to "put up" a play for criticism, but then became reticent. Mills responded, "if you can't even put up your piece for class then you should have just died of cancer." According to Mills, he was attempting "to motivate her to consider that art is worth putting yourself out for, and if we don't produce art, it's just as if we never had existed." The student viewed the remark otherwise, and filed a complaint against Mills with Carol Edwards, the new dean of the department's college. Final Order at 12, 20.

Currier and Pulver also filed formal complaints with Edwards that year. Based on these complaints and a review of Mills's personnel file, Edwards brought the matter to the University provost, who suspended Mills with full pay "pending an investigation of [the] complaints." Final Order at 2. The provost also arranged a meeting between Mills and University officials "to review and

discuss the complaints." Final Order at 2. After the meeting, the provost declined to reinstate Mills's teaching duties. Final Order at 2.

The provost then requested that the Faculty Senate appoint three members of the Standing Committee on Grievances and Sanctions and "attempt to 'effect an adjustment.'" Following the failure of these negotiations, the provost issued a formal statement of charges against Mills. Final Order at 3.

The provost alleged that Mills had violated section one of the Faculty Code of Ethics by failing in his "obligation to exercise self-discipline and judgment in using, extending and transmitting knowledge," that Mills had violated section two's requirement that faculty members "encourage the free pursuit of learning by students" and "avoid and condemn sexual harassment, intimidation, and the exploitation of students," and that Mills had violated section four's requirement that faculty members conduct themselves in a manner expressing "respect for, and defense of, the free inquiry of associates and, in the exchange of criticism and ideas, the respect for the opinions of others."

The University then convened a Hearing Panel of five faculty members and a nonvoting presiding officer. Final Order at 3. Citing procedures in the University's Faculty Handbook,³ and over the objections of both Mills and a newspaper reporter, the hearing was conducted in secret.

The Hearing Panel recommended that Mills be suspended without pay for two academic quarters. Final Order at 3. Ultimately, the University's Board of

³ "The hearing will be private, unless the Hearing Panel, in consultation with the Provost and only with the agreement of the faculty member, decides that the hearing should be public."

Trustees adopted this recommendation, concluding, among other things, that the hearing closure had been proper under the Faculty Handbook, which the Board characterized as a "provision of law." Final Order at 46-48.

Mills petitioned for review of the Board's decision pursuant to the state Administrative Procedure Act. The superior court denied relief. Mills then sought direct review in our Supreme Court, which transferred the case to us.

II

Under the Administrative Procedure Act, relief from a final agency decision is appropriate only if the decision "is in violation of constitutional provisions on its face or as applied"; "[t]he agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure"; "[t]he agency has erroneously interpreted or applied the law"; "[t]he order is inconsistent with a rule of the agency unless the agency explains the inconsistency by stating facts and reasons to demonstrate a rational basis for inconsistency"; or, "[t]he order is arbitrary or capricious." RCW 34.05.570. In reviewing an agency decision, the appellate court "sits in the same position as the superior court."⁴ Tapper v. Employment Sec. Dep't, 122 Wn.2d 397, 402, 858 P.2d 494 (1993).

III

⁴ It is unnecessary for us to address the superior court's decision, except to note the erroneous nature of that court's *sua sponte* ruling that Mills waived any statutory challenge to the closure of the disciplinary hearing by not seeking an extraordinary writ. Barring minor exceptions not at issue here, the Administrative Procedure Act is "the exclusive means of judicial review of agency action." RCW 34.05.510. Again, barring minor exceptions not at issue here, a person may seek judicial review pursuant to the Administrative Procedure Act "only after exhausting all administrative remedies available within the agency whose action is being challenged." RCW 34.05.534. Mills was required to—and properly did—pursue relief from the closure order from the Board of Trustees prior to petitioning a court. Nothing Mills did suggested any intent to abandon his challenge to the closure order. There was no waiver.

Mills contends on appeal that the University's disciplinary actions violated the terms of his employment contract—in the form of the University's Faculty Handbook⁵—both procedurally and substantively. He is wrong on both counts.

Prior to filing any statement of charges, the Faculty Handbook requires that the provost (1) attempt to settle the issue informally with the faculty member, and (2) engage a three-person faculty panel to conduct an inquiry and further attempt a settlement. There is no legitimate dispute that the provost did these things. Instead, the dispute arises because the provost suspended Mills, with pay, during the period in which these activities were occurring.

The Faculty Handbook states:

From the time at which charges are specified, the faculty member may be suspended . . . only if immediate harm to the faculty member or others is threatened by continuance. Before suspending a faculty member, pending an ultimate determination of the faculty member's status through the institution's hearing procedures, the Provost will consult with the Executive Council of the Faculty Senate concerning the propriety, the length, and the other conditions of any suspension. This consultation will occur within 10 working days of the filing of the statement of charges. . . . Salary will continue during the period of the suspension.

According to Mills, this provision requires the conclusion that the provost may not temporarily suspend a faculty member from teaching prior to the imposition of formal discipline without first making a "finding" that the faculty member's continued teaching threatens "immediate harm," and without consulting the Faculty Senate within 10 days of the charges being filed.

The problem with this theory is that the above-quoted provision expressly

⁵ The parties agree that the Faculty Handbook is incorporated into the employment contracts of all professors at the University.

addresses events that occur only “[f]rom the time at which charges are specified.” The Faculty Handbook provides no limitation on the provost’s authority over University employees in the period *between* when an investigation is initiated and the filing of formal disciplinary charges. No legal basis exists to read the *absence* of such restrictions as a limitation on the power of the University to place a professor on administrative leave while investigating alleged misconduct.

Mills is also incorrect in asserting that the University breached its substantive duties under his contract. He contends that breaches of the Faculty Code of Ethics—such as the breaches that provided the basis for his suspension—may never be relied upon by the University to impose formal discipline upon a faculty member, because violations of the Faculty Code of Ethics are not listed causes for serious discipline in the Faculty Handbook. Contrary to Mill’s contention, however, compliance with the Faculty Code of Ethics is included by reference as one of the duties of professors at the University and, thus, a breach of the Faculty Code of Ethics may legitimately serve as the basis for the imposition of serious discipline by the University.

Under the terms of the Faculty Handbook, good cause to terminate a tenured professor exists if the professor is guilty of, among other things, “serious and persistent neglect of faculty duties” or behavior that affects another person’s “ability to carry out his or her academic, scholarly, or professional university rights or responsibilities in a substantial way.” The Faculty Handbook states that

faculty duties, the dereliction of which may lead to discipline, "are listed in [Faculty Handbook] Section I, Part III, paragraphs C and D." (Emphasis added.) Paragraph D, subparagraph 2, provides in turn that "[f]aculty members have an obligation to adhere to and behave in keeping with the principles of faculty conduct contained in the Code of Faculty Ethics." Mills's argument boils down to nothing more than an erroneous contention that he cannot be found to have neglected his duties because only paragraph C is entitled "Faculty Duties," whereas paragraph D is instead entitled "Scholarly and Professional Qualifications of Faculty Members." This reading is contradictory to the plain text of the Faculty Handbook's disciplinary provisions, which also expressly cross-reference paragraph D as describing "faculty duties."

The University did not breach its employment contract with Mills.

IV

Mills next contends that the Faculty Code of Ethics violated his Fourteenth Amendment due process rights, both facially and as applied, because its provisions are too vague to be constitutionally enforceable. He is incorrect.

It is well established that non-probationary public employees may be discharged under a "for cause" standard, and that this standard is sufficiently definite to satisfy due process, even as applied in the context of discipline related to speech. Arnett v. Kennedy, 416 U.S. 134, 161, 164-65, 94 S. Ct. 1633, 40 L. Ed. 2d 15 (1974) (lead opinion and concurrence of Powell, J.). This

is so because the standard is construed to exclude discipline imposed as a result of engaging in constitutionally protected speech. Arnett, 416 U.S. at 162. This rule has been widely applied in the context of tenured university professors contesting discipline imposed against them for assorted misconduct. E.g., San Filippo v. Bongiovanni, 961 F.2d 1125, 1137 (3d Cir. 1992) (“standards of sound scholarship and competent teaching” not unconstitutionally vague); Garrett v. Mathews, 474 F. Supp. 594, 599 (N.D. Ala. 1979), aff’d, 625 F.2d 658 (5th Cir. 1980) (“adequate cause” not vague); Barham v. Univ. of N. Colo., 964 P.2d 545, 548-49 (Colo. Ct. App. 1997) (“legally sufficient ground” not vague); Phillips v. Bd. of Regents, 863 S.W.2d 45, 50 (Tenn. 1993) (“capricious disregard of accepted standards of professional conduct” not vague).

Notwithstanding this clear authority, Mills argues that the standards applied in his case are unconstitutionally vague. He cites the Ninth’s Circuit’s decision in Cohen v. San Bernardino Valley College, 92 F.3d 968 (9th Cir. 1996), in support of this contention. And, it is true, Cohen did hold that a college sexual harassment policy was unconstitutionally vague when applied to a professor’s boorish and innuendo-laden classroom presentation style. 92 F.3d at 972. But Mills is unlike the plaintiff in Cohen: the vast majority of the conduct for which Mills was disciplined was utterly unrelated to any pedagogical objective whatsoever, and so was not protected speech. Further, as the University correctly observes, Adamian v. Jacobsen, 523 F.2d 929, 932-33 (9th Cir. 1975), the primarily precedent relied upon in Cohen, sharply distinguishes “for cause”

policies used to stifle the content of speech (unacceptable) from those aimed at preserving the order and safety of the university environment (acceptable). Our courts have adopted this approach. Stastny v. Bd. of Trustees of Cent. Wash. Univ., 32 Wn. App. 239, 254, 647 P.2d 496 (1982).

Moreover, it is also well established that because the "vagueness doctrine is based on fair notice that certain conduct puts persons at risk of discharge[,] . . . standards are not void for vagueness as long as ordinary persons using ordinary common sense would be notified that certain conduct will put them at risk." San Filippo, 961 F.2d at 1136 (citing Arnett, 416 U.S. at 159). That is, an otherwise vague standard will nonetheless be considered constitutional if the party to whom it is applied is given actual notice of the type of conduct that may later result in discipline. Simmons v. Vancouver Sch. Dist. No. 37, 41 Wn. App. 365, 380, 704 P.2d 648 (1985). Here, University officials repeatedly described to Mills precisely the type of conduct considered unacceptable under the Faculty Handbook. Mills repeatedly disregarded these warnings and, unsurprisingly, was disciplined.

The University's Faculty Code of Ethics is not unconstitutionally vague.

V

Mills contends that the discipline imposed upon him by the University unduly restricts his academic freedom as a professor, and so violates the guarantees of the First Amendment of the United States Constitution and article I, section 5 of the Washington State Constitution. His contention is without

merit.

Mills is correct that "[a]cademic freedom is . . . a special concern of the First Amendment." Stastny, 32 Wn. App. at 249. But "[i]t does not follow that because academic freedom is inextricably related to the educational process it is implicated in every employment decision of an educational institution.' . . .

Academic freedom is not a license for . . . activities which are internally destructive to the proper function of the university or disruptive to the education process." Stastny, 32 Wn. App. at 249-50 (quoting Kunda v. Muhlenberg Coll., 621 F.2d 532, 547 (3d Cir. 1980)). "In determining whether an employee's dismissal violates his constitutional right to free speech, the interest of the employee . . . must be balanced against the interests of the state as employer."

Sinnott v. Skagit Valley Coll., 49 Wn. App. 878, 881, 746 P.2d 1213 (1987) (citing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 284, 97 S. Ct. 568, 50 L. Ed. 2d 471 (1977)). "Appropriate state interests against which First Amendment rights of teachers must be balanced include . . . '(1) The need to maintain harmony among coworkers; (2) the need to curtail conduct impeding the teacher's proper and competent performance of his daily duties; [and] (3) the need to prevent activities disruptive of the educational process and to provide for the orderly functioning of the university.'" Sinnott, 49 Wn. App. at 881-882 (quoting Stastny, 32 Wn. App. at 251).

At the outset, it is important to make clear that the vast majority of the conduct for which Mills was disciplined was entirely unrelated to any

pedagogical purpose, and thus did not constitute protected speech. To be explicit, none of the following behaviors implicate academic freedom in the slightest, or are protected by either the First Amendment or article I, section 5: verbally abusing faculty colleagues with discriminatory and sexual innuendo; harassing, intimidating, demeaning, and insulting students outside of the classroom; verbally abusing staff members and student assistants serving in an administrative capacity; brandishing weaponry; or threatening others with bodily harm or death. While Mills fixates on the fact that some of the statements for which he was disciplined occurred in the classroom, the simple fact is that the vast majority of the conduct for which he was disciplined occurred exclusively outside of the classroom. These instances of conduct alone would have justified the University's imposition of discipline, and are not the proper subject of First Amendment academic freedom analysis.

With respect to Mills's conduct that did occur in the classroom, we are unable to conclude that the University's interests were outweighed by Mills's. For example, contrary to Mills's assertions, his remarks to the student recovering from cancer did *not* serve a pedagogical purpose. The Board concluded as much, a determination that we consider to be more properly characterized as a finding of fact than as a conclusion of law. See Final Order at 33-34 ("The statement served no legitimate pedagogical purpose, was not germane to the subject matter of the course, and was a particularly egregious instance of emotional abuse, intimidation, exploitation, and Professor Mills's characteristic

inability to exercise appropriate self-discipline and restraint in dealing with students' personal and academic challenges."). The evidence supports this finding—which, we observe, the Board was far better qualified than are we to make.

Mills is unable to point to any other conduct for which he was disciplined that had even remotely pedagogical objectives. In any event, balanced against the University's interest in maintaining a safe classroom environment in the Theatre Arts department, and harmonious relations among Theatre Arts faculty, Mills's free speech interest in promoting the subject of his discipline by deliberately harassing and degrading certain groups of students, and by playing on the insecurities of less assertive students generally, is not more substantial than the University's interest in protecting students from Mills's abusive behavior. In other words, despite his attempts to categorize his invective as a teaching device, we doubt that Mills has any First Amendment interest in presenting a stream of insults directed at various discrete (and often constitutionally protected) groups. See, e.g., Martin v. Parrish, 805 F.2d 583 (5th Cir. 1986) (First Amendment does not protect "the abusive use of profanity in the classroom").

Mills's free speech rights were not violated.

VI

Finally, Mills contends that the University violated the open hearing provisions of the Administrative Procedure Act by closing his disciplinary hearing.

without legal authority to do so. We agree.

RCW 34.05.449(5) provides that agency adjudications must be "open to public observation, except for the parts that the presiding officer states to be closed under a provision of law expressly authorizing closure or under a protective order entered by the presiding officer pursuant to applicable rules." There is no dispute that the University neither sought a protective order nor followed the applicable procedures for obtaining one.

Rather, both the Hearing Panel and the Board of Trustees concluded that the Faculty Handbook constituted a "provision of law" authorizing closure without a protective order. And, it is true, the Faculty Handbook does state that adjudicative hearings on faculty disciplinary charges "will be private, unless the Hearing Panel, in consultation with the Provost and only with the agreement of the faculty member, decides that the hearing should be public."

The problem with the University's reliance on this statement, however, is that a statement in an internal agency procedural manual about how hearings should be conducted is not a "provision of law." "Unlike administrative rules and other formally promulgated agency regulations, internal policies and directives generally do not create law." Joyce v. Dep't of Corr., 155 Wn.2d 306, 323, 119 P.3d 825 (2005). That is, an "administrative rule has force of law only if the agency promulgated it with delegated authority." Pierce County v. State, 144 Wn. App. 783, 836, 185 P.3d 594 (2008). And here, although the Board of Trustees has been delegated authority to enact rules governing faculty relations,

RCW 28B.35.120(2), (12), not everything that the Board does that affects faculty is automatically a "rule" having the force and effect of law.

The only authority that the University offers in support of the contrary assertion is the Administrative Procedure Act's definition of "Rule," which, according to the University, stands for the proposition that "institutions of higher education are not required to codify their policies and procedures relating to 'employment relationships' in the Washington Administrative Code." According to the University, this in turn means that it was relieved of any obligation to follow the Administrative Procedure Act's rule-making procedures when promulgating any regulation that affects employee discipline.

But this is an incorrect interpretation of this provision. RCW 34.05.010(16) provides: "Rule' . . . does not include . . . rules of institutions of higher education involving standards of admission, academic advancement, academic credit, graduation and the granting of degrees, employment relationships, or fiscal processes." Contrary to the University's contention, this does not mean that the Administrative Procedure Act's definition of "Rule" empowers public universities in Washington to freely pronounce regulations with the force of law without engaging in notice-and-comment rule making. On the contrary—the entire purpose of the exemption in RCW 34.05.010(16) is to specify that certain actions of the University are *not* "rules" with the general force of law. Indeed, during oral argument before us, counsel for the University made clear that when the Administrative Procedure Act was adopted, the legislature

ensured that the state's public universities were not restricted to announcing principles enforceable against students and employees through quasi-legislative (i.e., law making) mechanisms.

Instead, in the listed subject areas, the University may propound general standards of conduct through internal policy making, or—as in the case of the University's relationships to its professors—through the integration of internal policies into employment contracts. This gives the University the flexibility to utilize a wide variety of generally applicable policies in dealing with its students and employees without the burden of notice-and-comment rule making, but it also means that those “rules” are simply internal policies, rather than “Rule[s]” as that term is used in the Administrative Procedure Act—that is, generally applicable standards having the force and effect of law, which are announced by executive agencies based on authority delegated to them by the legislature.

Here, there was no “provision of law” governing the closure of employee discipline hearings because there could be no such provision of law. The Administrative Procedure Act's definition of “Rule” specifically precludes the enactment of such a provision of law by the University acting in its quasi-legislative capacity. Rather, in order to guarantee the University flexibility, employment relationships, including the procedural aspects of employee discipline, have been demarcated by the legislature as an area of private contract and internal policy rather than of rule making.

The closure of Mills's disciplinary hearing violated RCW 35.05.449(5).

The Faculty Handbook did not constitute a “provision of law” exempting the University from RCW 35.05.449(5)’s procedural requirements. Rather, it was a private contract between Mills and the University.⁶

Our next inquiry, then, is whether the Administrative Procedure Act entitles Mills to a remedy and, if so, that remedy’s nature. We conclude that we must vacate the Board’s Final Order and remand to the University for a new hearing.

Under the Administrative Procedure Act, the type of agency action at issue defines the scope, nature, and standards for judicial relief available to the complaining party. The Administrative Procedure Act specifically enumerates standards justifying judicial relief from the final order in an adjudicative proceeding,⁷ including a statement that a court “*shall* grant relief . . . if it determines that . . . [t]he agency has engaged in unlawful procedure or decision-making process, or has failed to follow a prescribed procedure.” RCW 34.05.570(3)(c) (emphasis added).

Both Mills and the University misunderstand the remedy required in this case. The University contends that Mills is not entitled to relief at all because

⁶ Presumably, the University does not contend that it may avoid the Administrative Procedure Act’s open hearing provisions by contracting to do so. A “contract that is contrary to the terms and policy of an express legislative enactment is illegal and unenforceable.” Tanner Elec. Co-op. v. Puget Sound Power & Light Co., 128 Wn.2d 656, 669, 911 P.2d 1301 (1996).

⁷ There is no legitimate dispute that Mills’s disciplinary hearing was an adjudicative proceeding as defined by the Administrative Procedure Act. RCW 34.05.010(1) defines “Adjudicative proceeding” as any “proceeding before an agency in which an opportunity for hearing before that agency is required by statute or constitutional right before or after the entry of an order by the agency.” It has long been recognized that a tenured faculty member at a public university has a due process property interest in continued employment that may not be impaired absent a “proper inquiry.” E.g., Slochower v. Bd. of Higher Educ. of City of N.Y., 350 U.S. 551, 559, 76 S. Ct. 637, 100 L. Ed. 692 (1956).

the hearing closure did not “substantially prejudice[]” his case. It bases this assertion on RCW 34.05.570(1)(d)’s statement that “[g]enerally[,] . . . [t]he court shall grant relief only if it determines that a person seeking judicial relief has been substantially prejudiced by the action complained of.” But RCW 34.05.570(3) expressly specifies that which constitutes “prejudice” in adjudicative proceedings by enumerating actions from which the court *shall* grant relief, including orders that result from an “unlawful procedure or decision-making process.”

Mills, on the other hand, relies solely upon the harmless error-style analysis applied in the context of cases examining the *constitutional* open justice guarantee, rather than the statutory open hearing provisions of the Administrative Procedure Act, which are those applicable to executive agency adjudications. But here, both the right and the remedy are statutory; inquiring as to whether a “public trial right” violation is “de minimus,” see State v. Easterling, 157 Wn.2d 167, 180, 137 P.3d 825 (2006), is misguided. The *statutory* open hearing right may usually be restricted by the agency itself, provided it properly promulgates a rule allowing it to do so. Absent such a rule, however, an open hearing violation necessarily renders the adjudication an “unlawful procedure” warranting relief.

Here, the closure of Mills’s disciplinary hearing was contrary to the requirements of RCW 34.05.449(5) and, thus, constituted an unlawful adjudicative procedure. Pursuant to RCW 34.05.570(3)(c), Mills is entitled to

relief from the Board of Trustees' Review Decision and Final Order. That order is vacated. Because this court stands in the same position as the superior court and there is no additional relief that the superior court may give, we remand directly to the agency (i.e., the University) for a new hearing.⁸

VI

Mills requests an award of reasonable attorney fees. RCW 4.84.350 provides for such an award, stating that "a court shall award a qualified party that prevails in a judicial review of an agency action fees and other expenses, including reasonable attorneys' fees, unless the court finds that the agency action was substantially justified or that circumstances make an award unjust." Here, Mills qualifies for an attorney fee award because he is entitled to relief from the unlawful closure of his disciplinary hearing, which was not substantially justified. Upon proper application, our commissioner will enter an appropriate award.

The Board of Trustees' Review Decision and Final Order is vacated. This cause is remanded to the University for a new hearing.

Dwyer, A.C.J.

WE CONCUR:

⁸ Having resolved this question on statutory grounds, we need not address Mills's related contention that he had a state constitutional right to an open administrative hearing. Brunson v. Pierce County, No. 37094-8-II, 2009 WL 1059966, at *3 (Wash. Ct. App. Apr. 21, 2009) (published opinion) (we avoid reaching constitutional issues when able to decide cases on non-constitutional grounds).

Leach, J.

Appelwhite, J.

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

RECEIVED

JUN 26 2009

REGIONAL SERVICES DIVISION
BELLINGHAM WASHINGTON

PERRY MILLS,

Appellant,

v.

WESTERN WASHINGTON
UNIVERSITY,

Respondent.

DIVISION ONE

No. 62402-4-I

ORDER DENYING RESPONDENT'S
MOTION FOR RECONSIDERATION

The respondent having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 25th day of June, 2009.

FOR THE COURT:

Dan A.C.J.
Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 25 PM 2:55

APPENDIX C

RECEIVED
ATTORNEY GENERAL

JUN 26 2009

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
SERVICES DIVISION
BELLINGHAM WASHINGTON

PERRY MILLS,

Appellant,

v.

WESTERN WASHINGTON
UNIVERSITY,

Respondent.

DIVISION ONE

No. 62402-4-I

ORDER DENYING APPELLANT'S
MOTION FOR RECONSIDERATION

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 25th day of June, 2009.

FOR THE COURT:

D. J. A. C. J.
Judge

FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2009 JUN 25 PM 2:55

APPENDIX D

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7 **BOARD OF TRUSTEES**
8 **WESTERN WASHINGTON UNIVERSITY**

9 In the Matter of:

10 Professor PERRY MILLS,

11 Petitioner.

REVIEW DECISION
AND FINAL ORDER

12
13 THIS MATTER came before the Board of Trustees of Western Washington University
14 ("Board") on a petition by Professor Perry Mills ("Petitioner") for review of the Findings and
15 Judgment of the Hearing Panel ("Panel Decision"), and of the President Review of the
16 Findings and Judgment of the Hearing Panel ("President's Decision"). The President's
17 Decision affirmed the Panel's recommendation of a two-quarter suspension without pay for
18 violations of the Code of Faculty Ethics. Generally, those violations consisted of serious
19 verbal abuse and intimidation of students, faculty, and staff over a period of years.

20 We have reviewed the record herein, consisting of the exhibits and verbatim transcript
21 of the proceedings, and have considered the written and oral submissions of counsel. Having
22 also remanded this matter to the Hearing Panel for further proceedings, and having now
23 reviewed the Panel's Decision on Remand, the Board of Trustees hereby affirms the Panel's
24 reconsidered decision and adopts the Panel's recommendation of a two-quarter suspension
25 without pay.
26

1 While the Board has elected in this instance to defer to the Panel's recommended
2 sanction, we have done so reluctantly and primarily out of respect for the reconsidered
3 judgment of the Petitioner's faculty peers that the Petitioner is at least capable of reforming
4 his abusive behaviors. That said, we as trustees share with the faculty the guardianship of the
5 fundamental ethical standards and values that must guide the conduct of all members of our
6 academic community. The Petitioner is on notice that the University and this Board of
7 Trustees cannot and will not tolerate the abusive and unprofessional conduct exhibited on this
8 record.

9 10 I. FINDINGS OF FACT

11 A. Procedural Facts

12 1. Petitioner Perry Mills is a tenured faculty member with the rank of Associate
13 Professor. RP III 99, 102.¹ He has worked and taught in the University's Theatre Arts
14 Department for more than twenty years, receiving tenure in 1994. RP III 100, 114.

15 2. By notice dated October 18, 2004, Provost Andrew Bodman suspended the
16 Petitioner with pay pending an investigation of complaints received from faculty and students.
17 RP II 61-62; EX 2. The notice afforded Petitioner a post-suspension opportunity to meet "[a]t
18 [his] earliest convenience" with the Provost and other University officials to review and
19 discuss the complaints. The record indicates that such a meeting occurred on November 9,
20 2004, and that the Petitioner was represented by counsel. RP II 64. Petitioner's suspension
21 with pay has continued without interruption since October 18, 2004.

22 3. Following the notice of suspension, and in accordance with Art. XVII § 1(2) of
23 the Faculty Handbook,² Provost Bodman requested the Executive Council of the Faculty

24 ¹ Citations to the hearing record are to the verbatim Record of Proceedings (e.g., RP III 99, referring to
25 page 99 of Volume III) and to the Exhibits (e.g., EX 3.2, referring to the second page of Exhibit 3).

26 ² All references herein to the Western Washington University Faculty Handbook are to Section I of the
2003-05 Edition. For ease of reference, the major divisions of Section I are identified herein as "Articles," and
subdivisions within Articles are identified as "Sections."

1 Senate to appoint three members of the faculty's Standing Committee on Grievances and
2 Sanctions to conduct an inquiry and attempt to "effect an adjustment." RP II 65; EX 2. The
3 efforts of the parties to reach an informal resolution continued over a prolonged period, but
4 ultimately proved unsuccessful. RP II 65-66.

5 4. On June 6, 2005, following the failure of negotiations, Provost Bodman issued
6 a formal Statement of Charges against the Petitioner. RP II 66. Before hearing any evidence,
7 the Hearing Panel granted the Petitioner's motion to exclude the Statement of Charges from
8 the hearing record. RP II 15-23. Instead, the issues were reframed in a Summary of
9 Statement of Charges, a document that was ultimately marked and admitted as Exhibit 17 by
10 stipulation of the parties. RP III 22.

11 5. The Hearing Panel consisted of five faculty members selected from the Faculty
12 Senate's Standing Committee on Grievances and Sanctions: Jeffrey Grimm, James Inverarity,
13 Laura Laffrado, John Purdy, and David Rystrom. A Hearing Officer, the Honorable Robert
14 H. Alsdorf, was appointed to serve as a non-voting presiding officer. The Hearing Panel
15 received evidence and heard oral arguments in this matter on October 5, 12, 13, 14, and 19,
16 2005. The University, through Provost Bodman, Dean Carol Edwards, and former
17 Department Chair Mark Kuntz, was represented by Wendy Bohlke of the Attorney General's
18 Office. The Petitioner was represented by attorney James Lobsenz.

19 6. The Hearing Panel issued its decision on October 31, 2005. See Findings and
20 Judgment of Hearing Panel. The Panel Decision recommended that the Petitioner be
21 suspended without pay, but with continued medical benefits, for two academic quarters during
22 the regular academic year. The Panel also recommended that the Petitioner be permitted to
23 resume his faculty privileges and duties only upon signing a statement agreeing to comply
24 with the Code of Faculty Ethics.

25 7. By notice dated November 10, 2005, the Provost filed an appeal to University
26 President Karen Morse requesting that the Petitioner be dismissed for cause. By notice dated

1 November 14, 2005, the Petitioner filed a cross-appeal requesting that he be immediately
2 reinstated without any disciplinary action being imposed.

3 8. The President issued her decision on January 17, 2006. See President Review
4 of the Findings and Judgment of the Hearing Panel. The President affirmed the sanctions
5 recommended by the Hearing Panel. In addition to those sanctions, the President directed
6 Dean Carol Edwards to require certain "affirmative steps," including sexual harassment
7 training, to ensure that the Petitioner complies with his obligations as a faculty member.

8 9. By notice dated January 26, 2006, the Petitioner filed this petition for review
9 by the Board of Trustees. The Board issued a Notice of Hearing dated February 7, 2006,
10 setting a hearing in this matter for April 14, 2006. At the request of Petitioner's counsel, the
11 hearing was continued to June 8, 2006, at 3:00 p.m., at Western Washington University, Old
12 Main 430G, at which time and place the Board heard the oral arguments of counsel with the
13 following Trustees present and constituting a quorum: Philip E. Sharpe, Jr. (acting as Chair),
14 Howard Lincoln, Kevin Raymond, John D. Warner, Grace Yuan, and Peggy Zoro. Advising
15 the Board in this matter was Assistant Attorney General Alan Smith.

16 10. On July 26, 2006, the Board of Trustees issued a Review Decision and Order
17 on Remand directing the Hearing Panel to reconsider whether the Petitioner should be
18 dismissed for cause. Specifically, the Board requested the Panel to apply to the Board's
19 factual findings the definition of a "malicious" act as one that is substantially certain to cause
20 harm and that is done without just cause or excuse or in reckless disregard of the law or of a
21 person's rights. See Review Decision and Order on Remand, at 45.

22 11. The Hearing Panel reconvened on September 7, 2006, and issued its Decision
23 on Remand on September 25, 2006. Having reconsidered the evidence, the Hearing Panel
24 found itself unable "to articulate a discernible impact on any faculty member's or student's
25 actual academic, scholarly, scientific or professional activities or achievements, whether of
26 tenure, graduation, grades, scholarships or otherwise, that is *both* 'intentional and malicious'"

1 within the meaning of the Faculty Handbook. Decision on Remand, at 5 (original emphasis).
2 Accordingly, the Panel concluded that grounds did not exist to terminate the Petitioner's
3 employment. The Panel reaffirmed its recommended sanctions and also recommended that
4 the Petitioner, as a condition of his continuing employment, be required to conduct
5 standardized teaching evaluations in all his courses.

6 **B. Findings Relating to Faculty and Staff**

7 Deborah Greer Currier

8 12. The Hearing Panel's findings of fact relating to Professor Deborah Greer
9 Currier are supported by a preponderance of the evidence and are hereby adopted with such
10 modifications as the Board finds appropriate to clarify and amplify the Panel's findings with
11 specific references to the hearing record.

12 13. Professor Currier came to the University in the fall of 2001 as an untenured
13 lecturer in the Theatre Arts Department. RP III 6-7. Professor Mills told her on her first day
14 as a faculty member that she had better keep her legs closed, because she could not be
15 expected to teach students the same way she got her doctorate. RP III 10, 29; EX 3.2. From
16 the fall of 2001 through about 2003, Mills on more than one occasion called her to her face a
17 "bimbo," a "slut," and on one occasion a "cunt." RP III 8; EX 3.2. These incidents occurred
18 in the workplace. RP III 8. A student also reported to Currier that Mills had called her a
19 sexually derogatory name. RP III 8. After about two years, having secured a tenure-track
20 position, Currier made it clear to Mills that she would not tolerate his sexual innuendo, and he
21 stopped any direct verbal abuse of her. RP III 31-32; EX 3.2.

22 14. Currier was offended by Mills's treatment of her. RP III 10. The name-calling
23 and sexual innuendo made her feel "degraded" and "angry." RP III 9. The fact that he was
24 tenured and she was not affected the way she responded to him. RP III 12. She took to
25 avoiding him. RP III 14, 32, 35, 40. She did not formally complain because as a new faculty
26 member she felt she could not step forward. RP III 9. It angered her that Mills's derogatory

1 | comments about colleagues and students put her in a position where students were looking to
2 | her for her reaction. RP III 17, 19. She believes that Mills's behavior adversely affected her.
3 | RP III 21. She was "incredibly intimidated, bothered, hurt and put off by it," although she did
4 | not allow it to affect her teaching or her career. RP III 23. However, she reported being
5 | fearful of Mills after finally addressing her concerns in a letter to Dean Carol Edwards in
6 | October 2004. RP III 21-22; EX 3.2. Currier cried when Edwards told her that she took her
7 | concerns seriously and would look into them. RP II 85.

8 | Gregory Pulver

9 | 15. The Hearing Panel's findings of fact relating to Professor Gregory Pulver are
10 | supported by a preponderance of the evidence and are hereby adopted with such modifications
11 | as the Board finds appropriate to clarify and amplify the Panel's findings with specific
12 | references to the hearing record.

13 | 16. Gregory Pulver became a classified staff member in the Theatre Arts
14 | Department in 1997, and obtained a tenure-track faculty appointment in 1999. RP III 41-42,
15 | 54. In an early conversation with Pulver, sometime in the fall of 1997, Mills referred to Pulver
16 | as "just a stupid faggot." RP III 55; EX 3.4. Pulver was shocked that a professional colleague
17 | would say that to him. RP III 55. Sometime later, in the spring or fall of 1998, Pulver told
18 | Mills that he would not tolerate his sexually offensive language, and Mills stopped insulting
19 | him to his face. RP III 55-56; EX 3.4.

20 | 17. Mills then took to referring to Pulver as "Precious" in a lilting way that was
21 | suggestive of Pulver's sexual orientation. RP III 45. A number of students reported to Pulver
22 | that Mills had referred to him in class as "Precious." RP III 45. At a professional meeting in
23 | Alaska, a theatre professional with whom Pulver had had no prior relationship said to him,
24 | "Oh, I heard that your nickname was Precious." RP III 45-46. Pulver was "incredibly
25 | embarrassed" by this. RP III 46.

1 18. Pulver felt "intimidated," "nervous," and "upset" by Mills's treatment of him.
2 RP III 42, 45. He was fearful of his aggressive behavior, the way he talked about students and
3 fellow faculty members, his use of violent language, "[t]he way people are stupid and he'd like
4 to kill them all, erase them from the world." RP III 43-44. Pulver has for several years
5 avoided any contact with Mills, even to the point of retreating to his office to keep from
6 encountering him in the hallway. RP III 42-43, 59. He wrote to Dean Carol Edwards after she
7 arrived at the University in the fall of 2004 that he felt unsafe in the situation he was in. RP III
8 42; EX 3.4.

9 Kay Reddell

10 19. The Hearing Panel's findings of fact relating to staff member Kay Reddell are
11 supported by a preponderance of the evidence and are hereby adopted with such modifications
12 as the Board finds appropriate to clarify and amplify the Panel's findings with specific
13 references to the hearing record.

14 20. Kay Reddell has served as the administrative assistant in the Theatre Arts
15 Department since 1997. RP III 65-66. Professor Mills has called her derogatory names on
16 more than one occasion and over a period of several years. RP III 67. On one occasion Mills
17 became very angry with her because she had not succeeded in finding him a student to help out
18 with his class. He said, "You're just a stupid bitch. You're just white trailer trash." RP III 70-
19 71. Reddell did not feel it was appropriate for her to be demeaned and yelled at by Mills. RP
20 III 68.

21 21. Professor Currier observed Kay Reddell in states of anger and frustration after
22 encounters with Professor Mills. RP III 17-18. Professor Pulver also observed Reddell to be
23 "incredibly upset," "distraught," and "shaken" following an interchange with Mills. RP III 50.
24 Pulver counseled Reddell to treat Mills "like a bad puppy and tell him that he has no business
25 speaking to her that way and that he needs to leave the office." RP III 51.

1 Mark Kuntz

2 22. The Hearing Panel made no findings of fact relating to Professor Mark Kuntz
3 beyond finding that Mills has vigorously and repeatedly asserted that Kuntz's use of student
4 course fees constituted criminal acts of theft and embezzlement. The Board hereby adopts
5 such additional findings as are necessary to complete the record on review and to determine the
6 issues before us.

7 23. Professor Kuntz was Chair of the Theatre Arts Department from June 1999 to
8 September 2005. RP II 125-26. Professor Mills was not charged with any misconduct directed
9 toward or concerning Mark Kuntz. EX 17. However, Mills, as part of his own case,
10 introduced evidence of a dispute with Kuntz about student course fees in an apparent effort to
11 show bias or improper motivation. RP II 51-53.

12 24. The dispute concerned fees charged to students enrolled in Theatre Arts 201,
13 "Introduction to Cinema," a course taught by Mills. The fee was originally established to
14 purchase films to be shown in the cinema course. EX 15. Films purchased with cinema course
15 fees were kept in Wilson Library, where they also were made available to the campus
16 community as a whole. RP II 199. Over time, the advent of less expensive videos and
17 increased student enrollments in the cinema course resulted in a large accumulation of unspent
18 funds. RP II 181; EX 15.

19 25. As Department Chair, Kuntz initially addressed the excess funds issue by
20 reducing the amount of the cinema course fee. RP II 184-85; EX 15. He then sought to spend
21 down the excess funds by purchasing video equipment for use by Theatre Arts students. RP II
22 183, 185; EX 15. This equipment was also made available for use by the campus community
23 as a whole. RP II 185; EX 15. Student course fees continued to support the purchase of new
24 videos for the cinema course. RP II 181. However, as other departmental funds were available
25 to purchase any needed videos, Kuntz eventually proposed to eliminate the cinema course fee
26 altogether. RP II 190-91; EX 15.

1 26. According to Mills, the excess funds were approaching \$20,000 as of October
2 2002. RP III 141; EX 12. Mills had developed his own plan for spending the course fees on
3 videos, and requested the library to proceed in accordance with his plan. RP III 139-42; EX
4 12. Kuntz was the department official designated to authorize expenditures of student course
5 fees. RP II 182; EX 22.16. Kuntz notified Mills that he had instructed the library staff to
6 disregard Mills's request pending further discussion of how the funds should be used. RP II
7 181-82; EX 13. The decision was later made to discontinue the cinema course fee and to use
8 other funding sources to maintain the video collection. RP II 191-92; EX 14.

9 27. Mills was "chapped" that Kuntz had frustrated all his hard work and "just
10 ripped the throat out of my program." RP III 141-42, 144, 168. According to him, he at that
11 point "instituted an internal audit for inquiry into misappropriation of funds or embezzlement."
12 RP III 142. It is unclear from the record exactly when or at whose behest an internal audit was
13 conducted, but a draft audit report was circulated by Internal Auditor Kim Herrenkohl in
14 January 2004. RP II 166-67; EX 9. The evidence does not establish whether Kuntz
15 improperly used student course fees to purchase video equipment. A general student course
16 fee policy dated April 27, 1999, states that "[s]tudent course fees are a means of supplementing
17 those consumable materials or services that tuition or state funds cannot cover." EX 4. A
18 policy specific to the College of Fine and Performing Arts for Fiscal Years 2001 and 2002
19 indicates that cinema course fees were to be used for videos, DVDs, and "film equipment." RP
20 IV 26-28; EX 24.2. There is no evidence that the Internal Auditor ever issued a final audit
21 report.

22 28. Mills nevertheless has adamantly and publicly maintained, and still maintains,
23 that Kuntz is a "thief" and an "embezzler." RP III 142-43. He hoped that his statements would
24 have a negative impact on Kuntz's reputation. He wanted Kuntz arrested for embezzlement.
25 He considered it his "onerous duty" to tell people outside his department and the University
26 that Kuntz had embezzled and stolen money. RP III 143. Mills was assiduous in the

1 performance of his self-assigned duty. Professor Carrier heard Mills telling students that the
2 theatre faculty had put their trust in an embezzler and a liar. RP III 16-17, 23. Professor
3 Pulver and Kay Reddell both heard Mills publicly denouncing Kuntz as an embezzler, a cheat,
4 and a liar at a social function sponsored by the Bellingham Theatre Guild in May 2004. RP III
5 47-48 (Pulver); RP III 73-74 (Reddell); EX 16.

6 29. Kuntz was not surprised by Mills's statements about him. "It just seemed like
7 something Perry would do." RP II 153-54. He felt people would "just blow off" statements
8 like that "coming out of Perry's mouth." RP II 193. Kuntz did not believe Mills should be
9 stopped from criticizing his use of student course fees. RP II 193, 195. However, he was
10 concerned that Mills was making public statements that were hurting the reputation of the
11 department. RP II 193, 195. Kuntz made his concerns known to Linda Smeins, then Interim
12 Dean of the College of Fine and Performing Arts, in a memorandum dated May 28, 2004. RP
13 II 193; EX 16.

14 30. Professor Mills was suspended by Provost Andrew Bodman in October 2004 on
15 the recommendation of Dean Carol Edwards. RP II 62; EX 2.1, 3.1. Dean Edwards was new
16 to Western as of September 2004. RP II 84. Provost Bodman did not consult with Professor
17 Kuntz before ordering the suspension. RP II 78. Dean Edwards had consulted with Kuntz, RP
18 II 84-85, but was not aware that Mills had accused Kuntz of misappropriating student course
19 fees, RP II 102-04. There is no evidence that the student course fee issue was ever considered
20 in relation to the charges that were eventually brought against Professor Mills.

21 Other Faculty and Staff

22 31. The Hearing Panel made no specific findings relating to other faculty and staff,
23 although its Judgment assumes a pattern of repeated abuse of students, faculty, and staff alike.
24 Panel Decision at 9, 11. The Board hereby makes such findings of fact as are necessary to
25 complete the record on review and to determine the issues before us.
26

1 32. Professor Currier commonly heard Mills using derogatory terms at faculty
2 meetings in referring to other colleagues, calling them "idiots," "maggots," the usual." RP III
3 11. She heard Mills making derogatory comments about faculty members in other settings as
4 well. RP III 16-17. Two students reported to Currier that Mills told his writing class that, with
5 the exception of herself and Professor Germain, the Theatre Arts faculty were "total crap who
6 couldn't find their asses with both hands." RP III 17, 27; EX 3.2. Currier felt "relieved" when
7 Mills stopped attending faculty meetings. RP III 12.

8 33. Professor Kuntz stated that Mills was disrespectful of colleagues "pretty much
9 all the time" at faculty meetings. RP II 128. Mills often ranted at faculty meetings about
10 killing people. RP II 129, 151-52. Kuntz and other colleagues did not intervene because they
11 were afraid of Mills. RP II 152. Professor Pulver said Mills used "aggressive" and
12 "slanderous" words at faculty meetings. RP III 44. Colleagues would stop talking when Mills
13 talked and were reluctant to interact with him because of his argumentative nature. RP III 44-
14 45. Kay Reddell attended and took minutes of departmental meetings. RP III 69. At those
15 meetings Mills would get angry and would yell at colleagues or upset them in some way, often
16 calling them derogatory names. RP III 69-70.

17 34. Sylvia Tag was the library liaison assigned to work with the Theatre Arts
18 Department. RP III 127. Mills said derogatory things to her about Professor Kuntz and others.
19 RP III 129-30. Conversations with Mills "generally would degenerate into talking about other
20 people," and Tag was not very good at asking him to stop. RP III 130. She observed that other
21 library staff members avoided Mills. RP III 133. Mills became less of a problem for Tag after
22 she asked him what kind of things he might be saying about her. RP III 131.

23 **C. Findings Relating to Students**

24 [REDACTED]
25 35. The Hearing Panel's findings of fact relating to student [REDACTED] are
26 supported by a preponderance of the evidence and are hereby adopted with such modifications

1 as the Board finds appropriate to clarify and amplify the Panel's findings with specific
2 references to the hearing record.

3 36. [REDACTED] was a Theatre Arts student who graduated in the spring of 2005.
4 RP II 154, 155. In the fall of 2004, she gave Department Chair Mark Kuntz a written
5 complaint about Professor Mills. RP II 154-55; EX 3.5. Professor Kuntz forwarded her
6 complaint to Carol Edwards, Dean of the College of Fine and Performing Arts, on or about
7 October 12, 2004. RP II 84; EX 3.5.

8 37. [REDACTED] had been diagnosed in the fall of 2003 with ovarian cancer and had to
9 leave Western for surgery and chemotherapy. RP III 135, 207; EX 3.5. She returned in the
10 spring of 2004 and enrolled in Mills's dramatic writing class, a requirement for her major. RP
11 III 135-36; EX 3.5. She was not fully recovered, was still bald from chemotherapy, and faced
12 her insecurities every day. RP II 207; EX 3.5. At first she volunteered, but then expressed
13 reticence about presenting a playwriting piece in class. RP III 136; EX 3.5. In response, Mills
14 stated, [REDACTED] if you can't even put up your piece for class then you should have just died of
15 cancer" or words to similar effect. RP III 137; EX 3.5. Her eyes welled up with tears and her
16 classmates stared as she cast her work and put it up. EX 3.5.

17 38. Professor Mills testified that he said something to [REDACTED] like, "If you don't put
18 up your work, it's just as if you died of cancer and aren't here at all." RP III 137. He
19 acknowledged that his words were hard and that [REDACTED] appeared upset by what he said, but he
20 did not think his words were rude or cruel. RP III 137. He justified his words as "an attempt
21 to motivate her to consider that art is worth putting yourself out for, and if we don't produce
22 art, it's just as if we never had existed." RP III 137. He said he apologized to [REDACTED] afterward
23 for having to "bend her arm, but it worked." RP III 137-38. Mills's testimony on this point
24 proves only that he remains oblivious to the fact that he, more probably than not, could have
25 motivated [REDACTED] without being cruel to her. As [REDACTED] indicated, while Mills succeeded in
26 getting her to put up her work, his approach was "entirely inappropriate." EX 3.5.

1 [REDACTED]
2 39. The Hearing Panel found that no specific set of facts were proved relating to the
3 complaints of student [REDACTED] While the Board agrees with the Panel that several
4 witnesses testified and had different perceptions and recollections of what occurred, we find no
5 significant inconsistencies in their testimony. We therefore make such findings of fact as are
6 necessary to complete the record and to determine the issues before us.

7 40. [REDACTED] was a senior at Western at the time of the hearing. She took
8 Theatre 201 from Mills in the fall of 2004. RP III 77. On October 7, 2004, she parked in the
9 faculty lot where she and her boyfriend encountered Mills and a small group of male students.
10 RP III 77-78; EX 1.1. Mills and the students were standing on or near a sidewalk along the
11 back of the performing arts center. RP III 82. [REDACTED] had a Bush/Cheney bumper sticker on
12 her car. RP III 78. Mills made some statement to the effect that by voting for Bush, [REDACTED]
13 wanted the world to die and probably wanted him put to death, and that he probably would be
14 arrested for starting something. RP III 78; EX 1.1. [REDACTED] felt that Mills's statements were
15 belittling and disrespectful. RP III 79-80.

16 41. [REDACTED] felt she could not respond to Mills because she was enrolled in his
17 class and her boyfriend would be taking his class the next quarter. RP III 78. [REDACTED]
18 credibly testified that she was afraid of being "pinpointed" in class the way she had seen other
19 students treated. RP III 78. She mentioned one class in which Mills referred to Puyallup
20 residents as "white trash." The comment offended her because she is from that area. RP III
21 79. In another class, Mills shouted "Shut up, girl" to a student. [REDACTED] felt badly for her.
22 RP III 79. [REDACTED] complained to the Provost because Mills's treatment of her and other
23 students made her feel uncomfortable and intimidated. RP III 78, 79; EX 1.1.

24 42. [REDACTED] was one of the students with Mills when [REDACTED] parked in the
25 faculty lot. RP IV 37. Mills and the students were all making "side comments" prompted by
26 her Bush/Cheney bumper sticker. RP IV 37-38. Mills also made some joke that [REDACTED]

1 | does not remember about sinking [REDACTED] car in the La Brea Tar Pits. RP III 87; RP IV 39.
2 | [REDACTED] did not say anything in response to any of the comments made by Mills and the other
3 | students; she just walked off with "a pissed off sort of face." RP IV 40. [REDACTED] and his
4 | friends decided that [REDACTED] boyfriend was "cool," however, because he exchanged a few
5 | words with Mills about their mutual taste for cigars. RP IV 40-41.

6 | [REDACTED]
7 | 43. The Hearing Panel's findings relating to [REDACTED] and the October
8 | 2004 incident involving the classroom display of a knife generally pertain to matters that are
9 | extraneous to the Statement of Charges. Because our review of the record reveals evidence
10 | that the Panel did not adequately consider, the Panel's findings relating to [REDACTED]
11 | are not adopted, and the Board substitutes such findings as are necessary to determine the
12 | issues as framed by the Statement of Charges.

13 | 44. On or about October 6, 2004, Dean Edwards forwarded to Provost Bodman a
14 | memorandum from Department Chair Mark Kuntz regarding the display of a knife by
15 | Professor Mills in a classroom setting. RP II 73, 107. [REDACTED] was a student in
16 | Mills's playwriting class. RP III 91. As she was leaving class, she saw Mills displaying a
17 | knife to two or three other students. RP III 92-93. She told Professor Kuntz what she saw
18 | because she felt uneasy about it. RP III 93. She did not observe the other students to react in
19 | any way, but Mills's display of a knife made her feel unsafe. RP III 97. It seemed
20 | inappropriate to her that Mills was displaying a knife in a classroom setting. RP III 93.

21 | 45. [REDACTED] the student who testified about the incident involving [REDACTED]
22 | [REDACTED] was also one of the students to whom Mills was showing his knife. RP IV 41. [REDACTED]
23 | [REDACTED] another student in the class, was writing a play about *Lord of the Rings* and wanted to
24 | cast [REDACTED] as Gimli the Dwarf. RP IV 41-42. [REDACTED] asked [REDACTED] if he had a knife he
25 | could use as a prop. RP IV 42. [REDACTED] responded that Mills had a knife and they could just
26 | use his. RP IV 43. [REDACTED] testified to similar effect, stating that he had cast [REDACTED] as "a

1 rather rude Hells Angel type" and needed a "large, ugly looking knife." RP IV 57. According
2 to [REDACTED] Mills overheard them and volunteered the use of his knife. RP IV 57.

3 46. Mills took out his knife and, according to [REDACTED] said something to the effect
4 that you should use a sausage instead of a knife if you're doing *Henry VIII*, because someone
5 will go tell the department chair. RP IV 43, 51. [REDACTED] knew Mills had been in trouble
6 before for showing a knife in class. RP IV 44, 47. So [REDACTED] was thinking, "If there's
7 anyone in this class who doesn't like him, they're going to, like, go and run up and tell Mark
8 Kuntz." He then turned around and saw [REDACTED] RP IV 44-45. Dean Edwards said
9 [REDACTED] came to her afterwards because he was concerned that he may have gotten Mills
10 into trouble. RP II 120. [REDACTED] told Edwards that Mills's display of a knife might have been
11 disturbing to other students, but he did not see it the same way. RP II 121.

12 47. [REDACTED] described Mills's knife as "larger than a Swiss Army knife."
13 RP III 92. Mills said his knife probably has a four-inch blade. RP III 114. [REDACTED] said
14 Mills wore the knife on a clip on his waistband. RP IV 43. University policy prohibits the
15 possession of weapons on campus. RP IV 77; WAC 516-52-020(1). James Shaw, Director of
16 Public Safety and Chief of Police, indicated that the policy would prohibit carrying a knife
17 with a lockable blade over three and a half inches. RP IV 80.

18 48. In October 2000, in response to a previous student complaint, Kuntz had
19 admonished Mills in writing regarding his display of a knife in class. RP II 143-45; RP III
20 111; EX 7. In September 2001, Kuntz had again warned Mills in writing that he was not to
21 come to campus with weapons on his person. EX 19. The Theatre Arts faculty and staff also
22 addressed a letter in September 2001 to then Dean Bertil van Boer expressing their "real and
23 tangible fear" occasioned by Mills's carrying of a registered firearm and a large knife on
24 campus and in the classroom, together with his belligerent rants about killing people who
25 offended him. RP II 95; RP IV 50; EX 5. Dean van Boer, after consulting with the Provost,
26 warned Mills that he should not carry weapons on campus. RP IV 50.

Other Students

49. The Hearing Panel made certain findings relating to other students that are supported by a preponderance of the evidence and that are hereby adopted with such modifications and additional findings as are necessary to complete the record on review and to determine the issues before us.

50. Professor Currier at times heard Mills in conversations with students refer to various students in Currier's classes as "shit for brains," "blondies," and one overweight student as "a 400-pound canary who warbles nothingness" and "makes him sick." RP III 18; EX 3.2. The student targets of these remarks would sometimes learn about them from other students and become upset. RP III 18-19; EX 3.2. Currier also served as an academic advisor to drama and education students. RP III 14. Students, mostly women, came to her fairly regularly, as many as four each quarter, complaining of Mills's treatment of them. RP III 14-15, 37, 39. Their complaints included Mills's use of "tag words" such as "stupid liberals" and "privileged white kids" who were "just sucking on Momma's teat." RP III 15, 39. Many students cried when they came to see Currier. RP III 15. Currier referred them to Department Chair Mark Kuntz to request waivers from Mills's courses. RP III 15-16. Currier reported her concerns to Dean Carol Edwards in October 2004 because she wanted to put a stop to Mills's mistreatment of students. RP III 25-26; EX 3.2.

51. Professor Pulver "all the time" heard Mills using obscenities and derogatory language directed at or concerning students, including his favorite "F word," as in "fucking lazy girl." RP III 46, 52. Pulver received numerous complaints from students in Mills's classes, mostly female, some of them in tears. RP III 48-49. Pulver counseled female students not to cry in front of Mills, because "he would find your soft spot and he would go after that again and again." RP III 49. He advised gay students who might have to take a class from Mills to sit in the back and keep quiet. RP III 62. Pulver found it "nauseating" to have to give them such advice. RP III 62.

1 52. Kay Reddell supervised nine student office assistants and frequently had other
2 students in the office needing some kind of assistance. RP III 66. Mills would yell at the
3 office assistants or would yell at Reddell in front of students. RP III 68. Students in Mills's
4 classes or student assistants would come to Reddell upset and crying after being verbally "beat
5 up" by Mills. RP III 68-69. She recalled one instance in the spring of 2004 when Mills
6 became very angry with a student assistant who had failed to return a film to the library. Mills
7 was in the office screaming at the student and saying inappropriate things about her. RP III 71-
8 72. Professor Kuntz overheard these remarks from his office. RP II 157; RP III 72. He
9 testified from contemporaneous notes that Mills said, "You bitch, you screwed up." RP II 157-
10 58. Then he said, "I would understand if she were missing a leg" and "Is she retarded?" RP II
11 158. Other students were present during this outburst. RP II 158.

12 53. Professor Kuntz said the department was always in a "repair mode" trying to
13 solve the "Perry issue." RP II 129, 130. At the request of then Department Chair Thomas
14 Ward, Kuntz began teaching a playwriting class as an alternative for students who objected to
15 taking the class from Mills. RP II 129-30, 169. Kuntz also stated that "playing buffer for
16 students who were upset by Perry . . . has been a part of how we live in the Theatre
17 Department." RP II 130. Kuntz was always receiving student complaints about Mills, "pretty
18 much every quarter." RP II 137. While some students had typical unfair grading complaints,
19 others, mostly women, were complaining of derogatory language and being called names in
20 class. RP II 203, 204. The students were afraid of pressing a formal grievance against Mills.
21 RP II 204-05.

22 54. Several students testified in support of Professor Mills. [REDACTED], a 2000
23 graduate, took five or six classes from Mills. RP IV 18. He wrote a letter at the time praising
24 Mills to then Dean Bertil van Boer. RP IV 19; EX 20. In [REDACTED]'s experience, Mills did not
25 pick on anyone in particular. He felt it was established that anyone was a target. "It's like
26 *South Park*; there's no sacred cows." RP IV 26. [REDACTED] took a cinema class from Mills

1 in the fall of 2004. RP IV 30. He said "[Mills] was pretty outrageous, and I think he liked to
2 use shock value to get his students to listen." RP IV 31. [REDACTED] had a couple of friends in
3 class who also liked the "cool" things Mills said in class. RP IV 32. [REDACTED] said Mills was
4 "pretty much an equal opportunist griper; he would pick on pretty much everybody." RP IV
5 33.

6 55. [REDACTED] said he knew Mills well enough to understand that he did not take
7 "direct pot shots at you," but was just trying to motivate you. RP IV 48. He said there were
8 occasions when Mills used a characteristic like gender or sexual preference as a way of
9 targeting students to motivate them. RP IV 50. He said Mills called him "Fat Boy," but that
10 did not bother him. RP IV 50. He said other students are not as strong as he and did not really
11 understand "subtext" or "context." RP IV 50. To them, Mills was "just an old curmudgeon."
12 RP IV 51. A lot of students told [REDACTED] they were "scared to take Perry's class." RP IV 53.
13 Asked whether they were afraid of receiving a bad grade or being embarrassed in class,
14 [REDACTED] answered, "Well, I think a little of both." RP IV 53.

15 56. The evidence supports a finding that Professor Mills appealed to a core group of
16 students who are steadfastly loyal to him. Exhibit 25 consists of 22 supportive letters, half of
17 which appear to have been solicited in connection with Mills's unsuccessful bid for a
18 promotion in 1998. The tenor of these letters is highly laudatory of Mills's teaching. Exhibit
19 26, on the other hand, consists of six student complaints over a period ranging from fall 1998
20 through spring 2004. These letters strike a markedly different but consistent tone.

21 57. One student, [REDACTED], complained in April 2004 that Mills spends
22 class time "spouting off" on why "youth are so stupid and why Christians, particularly
23 Catholics, are the worst people on the planet." EX 26.1. [REDACTED] complained that Mills flat
24 out calls his students stupid. EX 26.1. When one student was absent from class, Mills
25 informed the entire class how happy he was the student was not there. EX 26.2. Another
26

1 student related to [REDACTED] that when he questioned something Mills had said about
2 Christianity, Mills told him he should be castrated. EX 26.2.

3 58. [REDACTED] complained in December 2002 that Mills showed little
4 respect for students, lecturing them in a degrading and offensive way. EX 26.3. The student
5 requested that his identify not be revealed to Mills because his grade was still at Mills's
6 discretion. EX 26.4. [REDACTED] wrote in December 2000 that Mills's lectures had little to do
7 with the films shown in class and more to do with the stupidity of his students and criticism of
8 the Catholic Church. She said students were not willing to speak up in class because Mills
9 called them stupid if they disagreed with his views. EX 26.5.

10 59. [REDACTED] writing in November 1998, asked to be withdrawn from Mills's
11 class without penalty, complaining that Mills was demeaning and intimidating to students,
12 using harsh profanities and telling them they were stupid. She said many students, including
13 herself, never offered their thoughts in class for fear of being told how stupid or ridiculous they
14 were. EX 26.8. A "concerned student," also writing in November 1998, complained that Mills
15 made demeaning comments about women, continually told students how stupid they were, and
16 went on to demean faculty colleagues. Among other things, Mills told students to "buy your
17 moms skimpy dresses and a motorcycle and then send them to me, but first they have to be
18 naked." The student was afraid to discuss these concerns with Mills for fear of him "cursing
19 obscenities" at the student. EX 26.9. Another student, [REDACTED] complained that Mills
20 insulted the intelligence of students, frequently made sexual comments, and generally taught in
21 a degrading manner. She indicated that she was dropping the class for those reasons. EX
22 26.10.

23 60. Even the letters from students who were supportive of Mills tend to bear out the
24 complaints of those who were not. [REDACTED] for example, noted with approval the
25 "comedic and shocking" nature of Mills's lectures and berated fellow students for their lack of
26 maturity. EX 25.4. [REDACTED] liked Mills's classes because his honesty seemed so harsh to

1 | some students that they actually dropped the class and then she did not have to be in class with
2 | a bunch of people who just wanted a "baby sitter" for a teacher. EX 25.6. [REDACTED] liked
3 | Mills's "colorful antics" and his willingness to admonish those who were lazy or "merely
4 | stupid." EX 25.7. [REDACTED] likewise thanked Mills for not tolerating "stupidity and
5 | ignorance." EX 25.9.

6 | 61. [REDACTED] perhaps summed it up best when she wrote appreciatively to
7 | Mills: "I hope you are doing well, and that there are a few gems amongst the shithheads and
8 | cretins in your classroom every now and again. Also in the department. Good lord." EX 25.8.
9 | These and other student comments in praise of Mills reflect an easy familiarity with Mills's
10 | evident penchant for engaging favored students in his pastime of belittling and speaking ill of
11 | other students and faculty members.

12 | **D. Findings Relating to Notice**

13 | 62. The Hearing Panel made only generalized findings relating to what notice
14 | Professor Mills may have been given in the past concerning the propriety of his behaviors.
15 | Accordingly, we make such additional findings as are necessary to complete the record and to
16 | determine the issues before us.

17 | 63. Dean Carol Edwards saw an "ongoing problem" with Professor Mills as
18 | indicated by his personnel file and the current complaints about him. RP II 94. In her view,
19 | Mills's actions had impacted the department for years. RP II 97. She stated that "people have
20 | tiptoed around, not engaged in the type of activities that faculty members engage in and
21 | collegial work environment in which everybody is comfortable and safe." RP II 97. She
22 | indicated that the faculty members who came forward with complaints were fearful of
23 | retaliation. RP II 98. As the new Dean, Edwards was not surprised that faculty members
24 | would bring unresolved issues from the past to her attention. RP II 105-06.

25 | 64. Professor Mills was denied a promotion to the rank of Professor in 1998-99. RP
26 | III 102; EX 18. Then Department Chair Thomas Ward recommended against a promotion

1 based in part on demonstrated weaknesses in the areas of teaching and service. EX 18.
2 Weaknesses in teaching included using foul language with and toward students, employing a
3 combative teaching style, discussing other faculty members with students in a derogatory and
4 demeaning manner, enjoying his wit at the expense of students, and berating and demeaning
5 students in the guise of humor. Also cited was an extremely high student complaint rate. EX
6 18.2-18.3. Weaknesses in service included using foul language with and toward theatre faculty
7 and staff, employing a combative tone with faculty members, and berating and demeaning
8 colleagues in the guise of humor. EX 18.3.

9 65. In October 2000, Department Chair Mark Kuntz admonished Mills in writing
10 about his making of off-color remarks concerning colleagues, women, gay students, and
11 minority populations. RP II 145; EX 7. The letter directed Mills's attention to Section 2 of the
12 Code of Faculty Ethics, where it is stated that "faculty avoid and condemn sexual harassment,
13 intimidation, and exploitation of students." RP II 145; EX 7.1-7.2. The letter further informed
14 Mills that the Faculty Handbook required the adherence of faculty members to the Code of
15 Faculty Ethics. EX 7.2. The letter concluded by warning Mills that "[y]our behavior must
16 change." EX 7.2.

17 66. In September 2001, Kuntz addressed to Mills what he described as "third in a
18 series of memos and another in a line of communications we have had concerning your
19 behavior." EX 19. The letter lamented that Kuntz's continued attempt to remedy a substantial
20 problem had been received with deaf ears. While acknowledging Mills's free speech rights,
21 the letter admonished Mills as follows: "Your behavior scares people. You know it. Your
22 repeated need to express your desire to 'kill' people is not appropriate, and will stop . . . Your
23 lack of sensitivity or care about the needs of students, staff, and colleagues must stop." The
24 letter concluded by requesting a meeting with Mills to work out a strategy for ensuring that
25 Mills would come to work unarmed, make a concerted effort to be collegial, and generate a
26

1 communication approach that allowed for his free speech rights while taking into account the
2 individual rights of others.

3 **E. Findings Relating to Petitioner's State of Mind**

4 67. The Hearing Panel, in Part A of its Judgment, made certain factual findings
5 relating to Professor Mills's state of mind that are supported by a preponderance of the
6 evidence and that are hereby adopted with such modifications and additions as the Board finds
7 necessary to clarify and complete the record and to determine the issues before us. However,
8 we do not adopt certain other findings that the Hearing Panel made based on demeanor
9 evidence. Nor do we adopt as findings those portions of the Panel's Judgment that are
10 properly set forth as conclusions of law.

11 68. Mills admitted using derogatory terms toward faculty colleagues and said he
12 had done so for the last five years. RP III 103. Yet he did not recall telling Professor Currier
13 to keep her legs closed or calling her sexually derogatory names. RP III 115, 144. He
14 nevertheless suggested that Currier may have contributed by acting in a certain way. RP III
15 163-64. Mills also did not recall calling Professor Pulver a faggot, but said it would not
16 surprise him if he did. RP III 134. He could not recall calling Kay Reddell a stupid bitch. RP
17 III 138.

18 69. Mills was familiar with the 1998 memorandum from then Department Chair
19 Thomas Ward recommending that he be denied a promotion to Professor. RP III 145; EX 18.
20 Yet he denied having been put on notice that parts of his behavior were not acceptable. RP III
21 147. He denied berating and demeaning students and colleagues. RP III 147. He denied using
22 humor to belittle students and others. RP III 177. He brushed off the concerns raised by Mark
23 Kuntz in 2001 about his talk of killing people. RP III 148; EX 19. He dismissed concerns that
24 his behaviors frightened people, insisting that nobody was afraid of him. RP III 173-75.

25 70. Mills suggested that he might do again what he did to [REDACTED], even
26 though he acknowledged that his behavior toward her was "brutal." RP III 154-55. He

1 justified his "casual attitude toward Anglo-Saxon words" as something he just picked up from
2 his students who talk that way. RP III 160. He denied any responsibility for his behaviors. RP
3 III 160. He did not know whether having tenure allowed him to use derogatory language
4 toward faculty and students. RP III 161. He summed up the witnesses against him as "a bunch
5 of people who didn't think [what he said] was funny when I did." RP III 164.

6 71. Professor Mills often behaves in a manner that is aggressive. He regularly
7 provokes students and others. Mills knows that his actions and comments induce stress and he
8 intends both the good and the bad consequences of his verbal acts. He knowingly and
9 intentionally engages in these acts. He engages in such conduct in part for the purpose of
10 stimulating students to rise above themselves, separating those students he considers good
11 from those he considers bad. His behavior is not, however, simply a matter of pedagogical
12 technique, nor does he use it selectively or judiciously solely to teach. Provocation is part of
13 his personality. Provocation is characteristic of his customary approach to faculty, students,
14 and staff alike.

15 72. Professor Mills knows, understands, and even expects that some recipients of
16 his words will be deeply upset and disturbed, and that not all of them will be able to respond
17 positively to his challenge. While on occasion he truly may not have formed a prior specific
18 malice for the particular person to whom he is then uttering his words, he shows continuing
19 disrespect to that class or group of persons he knows always to be present, those who are not
20 able to or choose not to rise to his challenge, often for fear of retribution.

21 II. CONCLUSIONS OF LAW

22 A. Governing Law and Jurisdiction

23 1. This is an adjudicative proceeding governed by the Administrative Procedure
24 Act, chapter 34.05 RCW ("APA"), and by Articles XV, XVI, and XVII of the Western
25 Washington University Faculty Handbook. This Board sits in its quasi-judicial capacity and
26 constitutes the University's "reviewing officers" for purposes of RCW 34.05.464.

1 2. The Petitioner is a tenured faculty member covered under and subject to the
2 provisions of the Faculty Handbook. Handbook, Art. II § C. The petition for review seeks
3 review of a proposed "severe sanction," was timely filed, and is otherwise proper. Art. XVII
4 § 4.a. This Board has jurisdiction over the person and subject matter herein.

5 **B. Standards of Review**

6 3. Both the Hearing Panel Decision and the President's Decision are before the
7 Board for review. Art. XVII § 3. Also before us is the Hearing Panel's reconsidered Decision
8 on Remand. Art. XVII § 4.c. The Board's review is to be "primarily based on the record of
9 the panel hearing," and no new evidence may be considered. Art. XVII § 4.a. The University
10 through its Provost bears the burden of proof by a preponderance of the evidence considered
11 as a whole. Art. XVII § 2.1.

12 4. Our review is *de novo* both as to findings of fact and conclusions of law.
13 Pursuant to RCW 34.05.464(4), we exercise all the decision-making power that we would
14 have had to decide and enter the final order had we presided over the Panel hearing, except to
15 the extent that the issues subject to review are limited by a "provision of law" or by us upon
16 notice to the parties.

17 5. We accept that the Faculty Handbook, Art. XVII § 4.b, may be regarded as a
18 "provision of law" for purposes of RCW 34.05.464(4). There it is provided that the Board
19 shall make one of the following determinations: (1) affirm the Panel's decision; (2) reverse or
20 amend the Panel's decision; or (3) remand for further proceedings. Any decision to reverse,
21 amend, or remand must be based on findings by the Board that (1) the Panel's decision was
22 arbitrary or capricious; (2) the procedures followed by the Panel in reaching its decision were
23 materially and prejudicially unfair or not in accordance with the law or University rules or
24 regulations; or (3) the Board's review has revealed the importance of evidence which the
25 Panel did not adequately consider.

1 6. The conclusion that our review is *de novo* is not limited by the provisions of
2 Art. XVII § 4.b. The term “decision” as used in Art. XVII § 4.b refers to the Hearing Panel’s
3 ultimate recommendation regarding the imposition of sanctions. While the Board must either
4 affirm that decision, reverse or amend the decision, or remand for further proceedings,
5 nothing in Art. XVII § 4.b limits the Board’s authority under RCW 34.05.464(4) to make its
6 own factual findings and legal conclusions in reaching its decision to affirm, reverse or
7 amend, or remand. The APA affirmatively requires us to make such findings and conclusions.
8 RCW 34.05.461(3). The Petitioner implicitly concedes that our review is *de novo* to the
9 extent that he requests us both to find that the Panel’s conclusions are not supported by the
10 evidence and to reverse the Panel’s decision. We do not “reverse” a factual finding or legal
11 conclusion; we reverse a “decision” or “judgment.” The Petitioner does not explain how we
12 could reverse the Panel’s decision without modifying its findings or conclusions as necessary
13 to conform to our substituted judgment.

14 7. We reject the argument of Petitioner’s counsel, advanced during oral argument,
15 that our review of legal questions is somehow limited by the “arbitrary and capricious”
16 standard under Art. XVII § 4.b. Agency action that is “arbitrary and capricious” includes
17 action that is erroneous as a matter of law. Helland v. King County Civil Service
18 Commission, 84 Wn.2d 858, 863 (1975); Matter of Stockwell, 28 Wn. App. 295, 302 (1981).
19 Our review of legal questions, including the application of law to the facts, is thus *de novo* and
20 is not limited by Art. XVII § 4.b.

21 8. We likewise reject the argument that Art. XVII § 4.b limits our review of
22 factual findings. The standard there set forth permits us to amend the Panel’s decision if our
23 review of the record reveals the importance of evidence that the Panel did not “adequately
24 consider.” Petitioner urges us to conclude that we can modify the Panel’s factual findings
25 only if we find important evidence that the Panel did not consider at all. As discussed, the
26 Petitioner confuses the Board’s authority under the Faculty Handbook to modify the Panel’s

1 decision and the Board's authority under the APA to modify factual findings. We decline for
2 any purpose to read the word "adequately" out of the standard set forth in Art. XVII § 4.b. If
3 "adequate consideration" of the evidence is to mean anything, it necessarily provides for *de*
4 *novo* review of factual findings by the Board.

5 9. Our review of factual findings and legal conclusions is limited by Art. XVII §
6 4.b only to the extent that we are required to make certain findings as set forth in the Faculty
7 Handbook if our decision is to reverse, amend, or remand the Panel's decision. Further, any
8 decision by the Board to reverse or amend the Panel's decision without remanding for further
9 proceedings must include a finding that, and an explanation as to why, further proceedings are
10 not advisable.

11 C. Standards for Imposition of Severe Sanctions

12 10. Review by the Board of Trustees is available only when a faculty member is
13 subject to the imposition of a "severe sanction." Art. XVII § 4.a. A severe sanction includes
14 dismissal for cause. Art. XVII. Severe sanctions other than dismissal "are those that involve
15 reduction in salary or temporary suspension with or without pay." Art. XVI.

16 11. Initially we must address the Petitioner's contention that the Provost cannot
17 "appeal" the President's recommendation affirming the Hearing Panel's recommendation of a
18 suspension rather than a dismissal. The Faculty Handbook provides that *either party* may
19 appeal a Hearing Panel decision to the President. Art. XVII § 3.a. At the next level of
20 review, the Handbook provides that the President, *upon request of the faculty member*, will
21 transmit the hearing record to the Board of Trustees. Art. XVII § 4.a.

22 12. The present appeal is properly before the Board "upon request of the faculty
23 member." In response, the Provost asks the Board to review the record and to conclude that
24 dismissal is the appropriate remedy. The Provost made the same request of the Hearing Panel
25 and of the President. Since the Board's review is *de novo*, the Provost's renewed request is
26 not improper. The Board is not bound by the recommendations of the Hearing Panel or the

1 President. We may substitute our judgment for theirs, with or without the Provost's request
2 that we do so.

3 13. Adequate cause for the imposition of a severe sanction, including dismissal for
4 cause, is defined in Art. XV § F. See Art. XV § F.B; Art. XVI; Art. XVII. In pertinent part,
5 "[a] faculty member covered under the Faculty Handbook may be dismissed for cause from
6 his or her position only for one or more of the following reasons:

7 (1) [a] serious and persistent neglect of faculty duties . . . [and/or] . . .

8 (5) [i]ntentional and malicious interference with the scientific, scholarly,
9 and academic activities of others."

10 Art. XV § F.B. In pertinent part, those same conduct standards define adequate cause for
11 severe sanctions other than dismissal. Art. XVI. We will refer to these conduct standards
12 respectively as the § F.B(1) "neglect of faculty duties" standard and the § F.B(5) "intentional
13 and malicious interference" standard.

14 14. The "intentional and malicious interference" standard under § F.B(5) is a
15 substantive conduct standard that is not be confused with an overarching standard under Art.
16 XV § F.A for determining whether faculty misconduct under § F.B warrants dismissal for
17 cause. Under Art. XV § F.A, to warrant a dismissal for cause where the faculty member's
18 conduct is alleged to have adversely affected another person, the conduct must "in an
19 *intentional and malicious way*" adversely affect the other person's ability to carry out his or
20 her academic, scholarly, or professional University responsibilities. To warrant a severe
21 sanction other than dismissal, the conduct must "in a *substantial way*" affect the other
22 person's ability to carry out his or her academic, scholarly, or professional rights or
23 responsibilities. Art. XVI.

24 15. The Faculty Handbook does not define the terms "intentional" and
25 "malicious." Nor did we find that the Hearing Panel was guided by any clear definitions of
26 those terms. Consequently, we were unable to ascertain how the Panel reached the conclusion
that the Petitioner's conduct toward others was often "intentional," but not "malicious." Clear

1 definitions are essential both for the purpose of determining whether a faculty member's
2 conduct violates the § F.B(5) "intentional and malicious interference" standard and for the
3 independent purpose of determining under § F.A whether faculty misconduct under § F.B
4 warrants dismissal for cause where the misconduct is alleged to have adversely affected
5 another person.

6 16. We construe undefined terms in the Faculty Handbook in their ordinary sense
7 with reference to a standard dictionary. Miller v. City of Tacoma, 138 Wn.2d 318, 327
8 (1999). An "intent" is the mental resolution or determination to do some act, and an
9 "intentional" act is done with the aim of carrying out the act. Black's Law Dictionary (7th Ed.
10 1999). A "malicious" act, or an act done with "malice," is one that is substantially certain to
11 cause injury and that is done without just cause or excuse or in reckless disregard of the law or
12 of a person's rights. Id.

13 17. The University through its Provost alleges that the Petitioner's conduct
14 violated both the § F.B(1) "neglect of faculty duties" standard and the § F.B(5) "intentional
15 and malicious interference" standard and that such conduct adversely affected other persons.
16 We must therefore consider the application of the terms "intentional" and "malicious" to each
17 of these standards.

18 18. If we find under § F.B(1) that the Petitioner's conduct constituted "a serious
19 and persistent neglect of faculty duties," we must then apply the above definitions of
20 "intentional" and "malicious" to determine whether the conduct interfered in an intentional
21 and malicious way with the other persons' ability to carry out their academic, scholarly, or
22 professional responsibilities. If it did, the Petitioner may be dismissed for cause. If it did not,
23 we then must consider whether the conduct interfered in a substantial way with the other
24 persons' ability to carry out their academic, scholarly, or professional responsibilities. If it
25 did, the Petitioner may be subjected to severe sanctions other than dismissal, such as the two-
26 quarter suspension recommended by the Hearing Panel.

1 19. Under § F.B(5), however, we initially apply the definitions of “intentional” and
2 “malicious” directly to the substantive conduct standard to determine whether a violation
3 occurred. If we find, applying those definitions, that the conduct constituted “intentional and
4 malicious interference with the scientific, scholarly, and academic activities of others,” we
5 then inquire whether the conduct adversely affected the ability of others to carry out their
6 responsibilities in an “intentional and malicious way” (warranting dismissal for cause) or in a
7 “substantial way” (warranting severe sanctions other than dismissal).³ We therefore agree
8 with Petitioner’s counsel that a violation under § F.B(5) always requires proof of intentional
9 and malicious interference, because that is an essential element of the conduct standard itself.
10 However, we reject Petitioner’s argument that a violation of the § F.B(1) neglect of duties
11 standard also requires proof of intentional and malicious interference. Such proof is required
12 under §§ F.A and F.B(1) only when the proposed sanction is dismissal for cause.

13 20. One further distinction must be drawn between the § F.B(1) neglect of duty
14 standard and the § F.B(5) malicious interference standard. A violation of § F.B(1) requires
15 that the neglect of faculty duties be both serious and persistent. The element of persistence
16 requires that the violation be shown to have occurred repeatedly over time. In contrast, a
17 violation of § F.B(5) may be predicated upon a single instance of intentional and malicious
18 interference with the scientific, scholarly, or academic activities of others.

19 21. We next address the Petitioner’s contention that a violation of the § F.B(1)
20 neglect of duties standard cannot be based upon violations of the Code of Faculty Ethics. As
21

22 ³ The Hearing Panel, in its Decision on Remand, at 3-4, concludes that conduct alone is never sufficient
23 for the imposition of sanctions. Thus, if the alleged conduct is “intentional and malicious interference with the
24 scientific, scholarly, and academic activities of others,” Art. XV § F.B.5, and if such conduct is alleged to have
25 adversely affected another person, then, in order to warrant dismissal for cause, “the impact of the faculty
26 member’s behavior must have affected the other person’s ability to carry out his or her academic, scholarly, or
professional University responsibilities in an intentional and malicious way,” Art. XV § F.A. As a practical
matter, the Board of Trustees perceives no substantive difference between conduct constituting “intentional and
malicious interference with the academic activities of others” and conduct “affecting another person’s ability to
carry out their academic responsibilities in an intentional and malicious way.” For the reasons previously stated,
however, we nonetheless adopt the Hearing Panel’s reasoning and have modified our conclusion accordingly.

1 discussed, a "serious and persistent neglect of faculty duties" constitutes grounds for severe
2 sanctions under Art. XV (dismissal) or Art. XVI (other severe sanctions) of the Faculty
3 Handbook. Art. XV § F.A expressly provides that "faculty responsibilities" are those listed
4 under Art. III §§ C and D. Art. III § D.1.a in turn provides that "[f]aculty members have an
5 obligation to adhere to and behave in keeping with the principles of faculty conduct contained
6 in the Code of Faculty Ethics." Art. III § D.1.a further incorporates the Code of Faculty
7 Ethics by reference to Appendix F of the Faculty Handbook. We construe the phrases
8 "faculty duties" under § F.B(1) and "faculty responsibilities" under § F.A in their ordinary
9 sense as synonyms of "faculty obligations" under Art. III § D.1.a. We therefore reject as
10 meritless the Petitioner's contention that violations of the Code of Faculty Ethics cannot serve
11 as grounds for dismissal or other severe sanctions under the § F.B(1) neglect of faculty duties
12 standard.

13 22. In accordance with the Statement of Charges (Exhibit 17), dismissal for cause
14 or other severe sanction may be warranted under the § F.B(1) neglect of faculty duties
15 standard if the proven facts, or some set of proven facts, establish that the Petitioner seriously
16 and persistently violated one or more of the following provisions of the Code of Faculty
17 Ethics:

18 **Section 1**

19 Western faculty members, guided by a deep conviction of the worth and dignity of their role in
20 the advancement and dissemination of knowledge, recognize the special responsibilities placed
21 upon them as scholars. Their primary responsibility to their respective subjects is to seek and
22 state the truth as they, in consequence of their academic competence, perceive it. To this end
23 faculty energies are devoted to developing and improving their scholarly competence. They
24 accept the obligation to exercise self-discipline and judgment in using, extending and
25 transmitting knowledge. They practice intellectual honesty. When subsidiary interests are
26 followed, they must insure that these interests do not seriously compromise freedom of inquiry
nor the fulfillment of academic responsibilities.

Section 2

As teachers, the Western faculty encourage the free pursuit of learning by students, and
demonstrate by example the best scholarly standards of their respective disciplines. The faculty
respect students as individuals and adhere to their designated role as intellectual guides and
counselors, make every effort to foster honest academic conduct and to assure that evaluations of
students reflect their actual performance. The faculty avoid and condemn sexual harassment,
intimidation, and the exploitation of students. The confidential nature of the relationship between

1 professor and student is respected, and any exploitation of students for private advantage is
2 avoided by the faculty member who acknowledges significant assistance from them. Faculty
3 strive to help students develop high standards of academic competency and respect for academic
4 freedom.

5 Section 4

6 As a colleague, the Western faculty member has special obligations that derive from membership
7 in the community of scholars. These include respect for, and defense of, the free inquiry of
8 associates and, in the exchange of criticism and ideas, the respect for the opinions of others.
9 Faculty members acknowledge the contributions of their colleagues and strive to be fair in their
10 professional judgment of colleagues. Each accepts his/her share of faculty responsibilities for the
11 governance of the institution.

12 23. Additional context for these ethical standards is provided in the Preface to the
13 Code of Faculty Ethics. There it is stated that "[m]embership in the academic community and
14 in the faculty of Western Washington University imposes upon faculty a range of obligations
15 beyond that currently accepted by the members of the wider society." Among these are the
16 "obligations to respect the dignity of others; to acknowledge the right of others to express
17 differing opinions; [and] to foster learning." The Code of Faculty Ethics recognizes that "[a]
18 professional faculty, as guardian of academic values, serves as the instrument of disciplinary
19 action against unjustified assaults upon those values by its own members."

20 24. In accordance with the Statement of Charges (Exhibit 17), dismissal for cause
21 or other severe sanction may be warranted under the § F.B(5) "intentional and malicious
22 interference standard" if any set of proven facts establishes that the Petitioner intentionally and
23 maliciously interfered with the scientific, scholarly, and academic activities of others. A
24 violation of the intentional and malicious interference standard need not be predicated upon the
25 violation of any provision of the Code of Faculty Ethics.

26 D. Constitutional Issues

27 25. We next address those matters with respect to which the Petitioner raises
28 objections based on his assertion of certain constitutional rights under the First and Fourteenth

1 Amendments. Petitioner does not, and could not, assert a First Amendment privilege to call a
2 female colleague a "cunt," a male colleague a "faggot," or an administrative assistant a "stupid
3 bitch." He does, however, assert First Amendment privileges with respect to his public
4 statements concerning Mark Kuntz's use of student course fees, his in-class statements to
5 [REDACTED] and his out-of-class statements to [REDACTED]. He also contends that the
6 Code of Faculty Ethics is unconstitutionally vague or overbroad for purposes of the First and
7 Fourteenth Amendments. Finally, the Petitioner contends that he cannot be disciplined for
8 misconduct toward Kay Reddell with which he was never charged. We address each of these
9 assertions in turn.

11 Student Course Fees

12 26. Student course fees are public funds that are to be used only for the purpose for
13 which they are assessed. We cannot determine on the record before us whether Professor
14 Kuntz properly used cinema course fees to purchase video equipment, nor need we make such
15 a determination. At issue is whether Mills could be disciplined for criticizing Kuntz's
16 expenditures of student course fees, irrespective of the propriety of such expenditures.

18 27. The evidence that Mills was angry at Kuntz for "ripping the throat" out of what
19 Mills regarded as "his program" supports a legal conclusion that Mills had a private grievance
20 against Kuntz. Statements concerning matters of personal interest are not protected by the
21 First Amendment. Connick v. Myers, 461 U.S. 138, 147 (1983). We nonetheless conclude
22 that the proper use of student course fees legitimately touches upon a matter of public concern.
23 Under Pickering v. Board of Education, 391 U.S. 563, 568 (1968), we would balance the
24 Petitioner's interests as a citizen in commenting upon matters of public concern and the
25 interests of the University, as employer, in promoting the efficiency of the public services it
26

1 performs through its employees. For our present purposes, however, we will assume, without
2 concluding, that the Petitioner's interests are not outweighed by the University's interests.

3 28. The First Amendment does not protect defamatory statements made with actual
4 malice in the case of public officials, New York Times Co. v. Sullivan, 376 U.S. 254 (1964), or
5 negligently in the case of private persons, Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).
6 No reasonable person could conclude that Mills was justified in publicly denouncing Professor
7 Kuntz as a thief and an embezzler. Mills made those statements to students, colleagues, and
8 others knowing the statements to be false or with reckless indifference to their truth or falsity.
9 We further conclude that the statements were made "intentionally and maliciously" within the
10 meaning of the Faculty Handbook. Mills expressly intended to injure Kuntz's reputation.
11

12 29. We nevertheless conclude, based on the evidence, that Mills's statements did
13 not in any way "adversely affect" or "interfere" with Kuntz's ability to carry out his academic
14 or professional responsibilities. Professor Mills therefore cannot be disciplined for his
15 statements concerning Professor Kuntz's use of student course fees. Additionally, we conclude
16 that Mills was never charged with having made those statements and that such statements were
17 never considered by the University as a motivating factor in bringing disciplinary action
18 against him.
19

20 [REDACTED]
21
22 30. Professor Mills's in-class statement to [REDACTED] to the effect that she might
23 as well have died of cancer was gratuitous and cruel. The statement served no legitimate
24 pedagogical purpose, was not germane to the subject matter of the course, and was a
25 particularly egregious instance of emotional abuse, intimidation, exploitation, and Professor
26

1 Mills's characteristic inability to exercise appropriate self-discipline and restraint in dealing
2 with students' personal and academic challenges.

3 31. While academic freedom is recognized as a core First Amendment right,
4 Sweezy v. New Hampshire, 354 U.S. 234, 250 (1957), the courts have generally declined to
5 delineate its precise contours, Garcetti v. Ceballos, 126 S.Ct. 1951, 1962 (2006); California
6 Teachers Association v. State Board of Education, 271 F.3d 1141, 1148 (9th Cir. 2001). The
7 courts have likewise refrained from interfering with an educational institution's genuinely
8 academic decisions, University of Michigan v. Ewing, 474 U.S. 214, 225 (1985), or with the
9 lawful exercise of the institution's own essential freedoms to determine what may be taught,
10 how it will be taught, and who will teach it, Sweezy, 354 U.S. at 263.

12 32. Western Washington University, through its Faculty Senate and Board of
13 Trustees, has adopted certain standards with respect to how its courses will be taught. Those
14 standards are set forth in the Code of Faculty Ethics. In the spirit of shared governance,
15 particularly with respect to academic matters, that Code recognizes that "[a] professional
16 faculty, as guardian of academic values, serves as the instrument of disciplinary action against
17 unjustified assaults upon those values by its own members." Faculty Handbook, Appendix F.
18 This Board will not lightly disturb the considered academic judgment of a Faculty Hearing
19 Panel that the Petitioner's mistreatment of [REDACTED] constituted an unjustified assault on
20 the institution's core academic values.

23 33. While teachers do not shed their constitutional rights at the schoolhouse gate,
24 schools can restrict speech that substantially interferes with schoolwork or discipline. Tinker
25 v. Des Moines Independent Community School District, 393 U.S. 503, 506-08 (1969). And
26 while academic freedom protects classroom speech that is germane to the subject matter,

1 Hardy v. Jefferson Community College, 260 F.3d 671, 679 (6th Cir. 2001), classroom speech is
2 not germane if it bears no reasonable relation to the course content and is contrary to a policy
3 regulating speech that the institution has determined to be disruptive of the educational
4 process, even where such speech is ostensibly used for the purpose of motivating students to
5 perform. Bonnell v. Lorenzo, 241 F.3d 800, 820 (6th Cir. 2001); Martin v. Parrish, 805 F.2d
6 583, 585-86 (5th Cir. 1986). Since the classroom is not a public forum, the University can
7 impose reasonable restrictions on classroom speech that relate to legitimate pedagogical
8 concerns such as ensuring that students are not verbally abused and intimidated. Hazelwood
9 School District v. Kuhlmeier, 484 U.S. 260, 267-73 (1988); Piggee v. Carl Sandburg College,
10 __ F.3d __, 2006 WL 2771669 (7th Cir. 2006).

11 [REDACTED]
12 [REDACTED]
13
14 34. With respect to the location of the incident involving [REDACTED] the
15 evidence does not establish that a restricted faculty parking lot or the rear entrance to the
16 performing arts center would be considered an open public forum for purposes of First
17 Amendment forum analysis. Nor is there any evidence that the University has designated the
18 campus as a whole as an open or even limited public forum.

19 35. Irrespective of the forum, at least some of Mills's statements directed at
20 [REDACTED] clearly constituted protected political speech, while other statements as clearly did
21 not. Certainly his statements regarding President Bush were privileged. However, his
22 statement about sinking [REDACTED] car in the La Brea Tar Pits was not political speech, but
23 merely a juvenile taunt intended to provoke [REDACTED] and to amuse Mills's young friends at
24 [REDACTED] expense.
25 [REDACTED]
26

1 36. Whether political or nonpolitical in nature, we nevertheless disregard all of
2 Mills's statements to or concerning [REDACTED] because they were not the sort of statements that
3 could reasonably be regarded as violating any provision of the Faculty Handbook or Code of
4 Ethics. What does concern us is [REDACTED] credible testimony that she felt she could not
5 respond to Mills for fear of being "pinpointed" in his class the way she had seen other students
6 treated. While the Petitioner should not be disciplined for his statements to [REDACTED] in the
7 parking lot, he can and must be held accountable for his creation of an intimidating classroom
8 environment in which students are reluctant to exercise their own First Amendment rights for
9 fear of retribution.
10

11 Code of Faculty Ethics

12 37. The Petitioner contends that the Code of Faculty Ethics is unconstitutionally
13 vague or overbroad for purposes of the First and Fourteenth Amendments. Generally, a
14 standard of ethical conduct is unconstitutionally vague or overbroad if the standard fails to
15 provide reasonable notice of what conduct is prohibited or if it sweeps in protected speech or
16 expressive conduct. Grayned v. City of Rockford, 408 U.S. 104 (1972).
17

18 38. The Code of Faculty Ethics is the product of the faculty's own self-governance
19 in matters relating to academic freedom and standards of professional conduct. Section 9 of
20 the Code states a presumption that "members of the Western faculty will find this Code of
21 Ethics an adequate guide for the choices they must make in the fulfillment of their academic
22 functions." We concur with the President's conclusion that "[t]he Code of Ethics is
23 sufficiently clear and precise to allow each member of the faculty to know what is required."
24 President's Decision at 3.
25
26

1 39. Due process does not require an academic institution to expressly prohibit every
2 imaginable inappropriate action by its faculty. Ward v. Hickey, 996 F.2d 448, 454 (1st Cir.
3 1993). Nor is perfect clarity required even when a policy regulates protected speech.
4 California Teachers Association, 271 F.3d at 1150. Condemned to the use of words, we can
5 never expect mathematical certainty from our language. Grayned, 408 U.S. at 110.

6 40. Ethical standards requiring faculty members to respect the dignity and opinions
7 of colleagues and to respect students as individuals, while broadly phrased and lacking in
8 mathematical precision, are sufficiently clear to have put the Petitioner on notice that such
9 standards prohibited his nearly unimaginable words directed to Deborah Currier, Gregory
10 Pulver, Kay Reddell, and [REDACTED] It is unreasonable for the Petitioner to expect that the
11 Code of Faculty Ethics should have to spell out that faculty members cannot verbally abuse or
12 intimidate colleagues and students based on personal characteristics such as gender, sexual
13 orientation, or physically debilitating diseases.

14 41. Even a workplace policy that is unconstitutionally vague on its face is not
15 unconstitutionally vague as applied if it is coupled with sufficient notice of what conduct is
16 proscribed. Stastny v. Board of Trustees of Central Washington University, 32 Wn. App. 239,
17 254 (1982), review denied, 98 Wn.2d 1001 (1982), cert. denied, 460 U.S. 1071 (1983). A
18 faculty member has sufficient notice of what conduct is proscribed if, based on existing
19 policies, discussions, and other communications, it is reasonable for the institution to expect
20 the faculty member to know that his conduct was prohibited. Ward, 996 F.2d at 454. A
21 teacher thus has fair notice when he has repeatedly been warned that his behaviors will not be
22 tolerated. Simmons v. Vancouver School District, 41 Wn. App. 365, 372 (1985), review
23 denied, 104 Wn.2d 1018 (1985). Particularly instructive is Sinnot v. Skagit Valley College, 49
24 Wn. App. 878, 886-87 (1987), review denied, 110 Wn.2d 1010 (1988), holding that workplace
25 conduct standards were not unconstitutionally vague as applied where a tenured instructor was
26

1 terminated after repeatedly being warned that the conduct standards prohibited his profanity
2 and derogatory statements about other faculty members.

3 42. The Petitioner's reliance on Cohen v. San Bernardino Valley College, 92 F.3d
4 968 (9th Cir. 1996), is misplaced. In that case, a professor was disciplined without previously
5 being warned that a new sexual harassment policy prohibited classroom statements that the
6 College had tolerated for years. Petitioner Mills was put on notice as early as 1998, when he
7 was denied a promotion, that certain conduct was not appropriate. He was warned again in
8 2000 and 2001 that his inappropriate behaviors must stop. He was specifically told that such
9 behaviors did not conform to the standards of conduct set forth in the Code of Faculty Ethics.
10 These repeated written warnings, together with various other discussions and communications,
11 were more than sufficient to put Petitioner Mills on notice that his behaviors were
12 unacceptable.

13 Kay Reddell

14 43. The Petitioner contends that he cannot be disciplined based on misconduct
15 toward Kay Reddell with which he was never charged. The formal Statement of Charges was
16 excluded from the hearing record on the Petitioner's own motion. The Petitioner therefore
17 cannot be heard to complain if the only statement of charges before us is the Summary
18 Statement of Charges admitted as Exhibit 17 upon the stipulation of the parties.

19 44. The Faculty Handbook requires only that the charges against a faculty member
20 be stated with "reasonable particularity." Art. XVII § 1(3). The Summary Statement of
21 Charges alleges that "Mark Kuntz witnessed Mills verbally abusing students, colleagues *and*
22 *staff* in Spring and Fall 2004." EX 17.3 (emphasis added). Kay Reddell is a staff member.
23 Mark Kuntz did testify about an incident involving Reddell in the spring of 2004. The Board
24 concludes that the charges relating to Kay Reddell were stated with reasonable particularity.

25 45. Additionally, the record shows that the Petitioner had an adequate opportunity
26 to defend himself against the charges of misconduct relating to Kay Reddell. Both Kuntz and

1 Reddell were available for and were in fact subjected to cross-examination. To the extent that
2 there may have been any element of surprise, such surprise was rendered harmless by the
3 Hearing Officer's willingness at any time during the proceedings to continue the hearing as
4 needed to allow the Petitioner an adequate opportunity to defend himself.

5 **E. Neglect of Faculty Duties Standard**

6 46. We conclude that our factual findings, considered as a whole, establish serious
7 and persistent neglect of faculty duties with reference to the § F.B(1) "neglect of faculty
8 duties" standard and Sections 1, 2, and 4 of the Code of Faculty Ethics. We base this
9 conclusion on our findings that faculty, staff, and students have been subjected over a period of
10 years to the Petitioner's verbal abuse, sexual innuendo, harassment, intimidation, exploitation,
11 and lack of self-discipline, restraint, and professional judgment.

12 47. Section 1 of the Code of Faculty Ethics requires faculty members to recognize
13 the special responsibilities placed upon them as scholars. Their primary responsibility for their
14 respective subjects is to seek and state the truth as they, *in consequence of their academic*
15 *competence*, perceive it. They accept the obligation to exercise *self-discipline and judgment* in
16 using and transmitting knowledge. The Petitioner's statement to [REDACTED] about dying
17 from cancer was not made in consequence of the Petitioner's academic competence and
18 demonstrated an utter lack of self-discipline and judgment in the transmission of knowledge.
19 The same must be concluded with respect to the Petitioner's constant haranguing and
20 ridiculing of his students as privileged, lazy, and stupid; his classroom use of profanities and
21 sexual innuendo; his demeaning and degrading comments based on characteristics like gender
22 or sexual orientation; his use of class time to espouse his views regarding Christianity and the
23 Catholic Church in particular; and his disparaging of fellow faculty members. None of this has
24 anything to do with the subject matter of the Petitioner's courses, none of it is offered in
25 consequence of the Petitioner's academic competence, and none of it exhibits self-discipline or
26 judgment in the transmission of knowledge.

1 48. Section 2 of the Code of Faculty Ethics requires faculty members to encourage
2 the free pursuit of learning by students. The faculty respect students as individuals. Faculty
3 avoid and condemn sexual harassment, intimidation, and the exploitation of students. The free
4 pursuit of learning by students is not encouraged by creating a hostile and intimidating
5 classroom environment in which students refrain from participating in class discussions or
6 speaking their minds in or out of class for fear of being singled out and ridiculed by their
7 teacher. Respect for students is not demonstrated by calling them "stupid," "privileged white
8 kids," "shit for brains," "blondies," "400-pound canary," or "retarded." These and other
9 behaviors show a serious lack of commitment to avoiding sexual harassment, intimidation, and
10 exploitation of students.

11 49. Section 4 of the Code of Faculty Ethics recognizes that faculty members have
12 special obligations as colleagues that derive from their membership in the community of
13 scholars. At a minimum, faculty members must treat each other with respect and must strive to
14 be fair in their professional judgment of colleagues. The respectful treatment of colleagues is
15 not demonstrated by making sexually degrading remarks to and concerning other faculty
16 members; disrupting faculty meetings with abusive and slanderous rants; shouting obscenities
17 at the departmental secretary; or making derogatory comments about departmental colleagues
18 to students. Far from striving to be fair in his professional judgment of colleagues, the
19 Petitioner has time and again demonstrated a complete failure to exercise any judgment at all.

20 50. The Petitioner's neglect of his faculty obligations is serious. No written code of
21 ethics is required to put a reasonable faculty member on notice that calling a female colleague
22 a "slut" and a "cunt;" a male colleague a "faggot;" an administrative secretary a "stupid bitch"
23 and "white trailer trash;" and a student assistant a "bitch" constitutes a serious breach of
24 professional ethics. Such misconduct cannot be tolerated in any workplace because of its
25 destructive impact on employee morale and productivity, not to mention its potential for
26 subjecting the employer to sexual harassment claims. Equally serious, and for much the same

1 reasons, are racially charged references to students and staff as "white trash" and "privileged
2 white kids," as well as statements exhibiting a callous insensitivity to mental and physical
3 disabilities. See Finding of Fact 37 (██████████ if you can't even put up your piece for class then
4 you should have just died of cancer"); Finding of Fact 52 ("I would understand if [the student]
5 were missing a leg," "Is she retarded?"). Effective remedial action is required to protect the
6 University and its faculty, staff, and students from the Petitioner's unrestrained indifference to
7 fundamental civil rights.

8 51. The Petitioner's neglect of his faculty obligations is persistent. His
9 mistreatment of faculty, staff, and students has continued unabated for well over five years
10 despite multiple warnings that his behaviors do not conform to acceptable workplace
11 standards. We are not swayed by the Petitioner's argument that persistence cannot be proved
12 based on the mere fact that he has sometimes refrained from further instances of specific
13 misconduct after being confronted about it by the individuals targeted by his abuse. The
14 evidence is overwhelming that the Petitioner has persistently engaged in a pattern and practice
15 of verbal abuse and intimidation directed at students, faculty, and staff. While such abuse and
16 intimidation may take various forms and be directed at various individuals in a variety of
17 settings, the pattern and practice of abuse and intimidation is regrettably consistent,
18 unchanging, and continuing.

19 52. The Petitioner's neglect of faculty duties adversely affected in a substantial way
20 the ability of others to carry out their academic, scholarly, or professional responsibilities.
21 Faculty colleagues have gone out of their way to avoid chance encounters with him. They stop
22 talking and refrain from interacting with him at faculty meetings because of his insulting and
23 aggressive manner. The Petitioner's treatment of colleagues has caused them to feel degraded,
24 intimidated, angry, embarrassed, fearful, and upset. Faculty members have often had to
25 intercede on behalf of students who were upset by the Petitioner's mistreatment of them. As
26

1 Mark Kuntz testified, the department was constantly in a "repair mode" trying to solve "the
2 Perry issue."

3 53. Students in the Petitioner's classes felt belittled, degraded, and intimidated by
4 his treatment of them. They were reluctant to speak up in class or to discuss their concerns
5 with the Petitioner for fear of being ridiculed or cursed. [REDACTED] as just one
6 example, was afraid of being "pinpointed" in class if she said anything in response to the
7 Petitioner's taunts regarding her political views. A number of students requested waivers from
8 the Petitioner's courses or withdrew from his courses after enrolling because of his abusive and
9 intimidating behaviors. Perhaps the most egregious instance of substantially affecting a
10 student's academic endeavors was the Petitioner's treatment of [REDACTED]. His cruelty
11 toward her served no legitimate pedagogical purpose and was not necessary to motivate her to
12 present her work.

13 54. Additionally, we conclude that Petitioner Mills has persistently ignored
14 warnings regarding University policies prohibiting the possession of weapons on campus. His
15 own testimony establishes that the knife he displayed in front of [REDACTED] had a four-
16 inch blade. Police Chief Shaw testified that possessing such a knife on campus would violate
17 University policy. We conclude based on this evidence that the Petitioner did violate the
18 policy despite repeated warnings. Further, we conclude that his classroom display of the knife
19 was intimidating to at least one student and substantially interfered with her academic pursuits
20 to that extent that it caused her to feel apprehensive and unsafe. We concur with the
21 Petitioner's departmental colleagues (see Exhibits 5 and 7) in failing to see how his carrying of
22 weapons on campus better serves the interests of students, faculty, and staff.

23 55. A severe sanction short of dismissal is plainly warranted based on the foregoing
24 conclusions relating to the Petitioner's serious and persistent neglect of faculty duties and the
25 substantial impact that his behaviors have had on the ability of faculty, staff, and students to
26 carry out their academic and professional rights and responsibilities. We nevertheless reserved

1 a final decision regarding the imposition of sanctions pending further review by the Faculty
2 Hearing Panel as to whether or not the Petitioner should be dismissed for cause. See Order on
3 Remand at 40.

4 56. Dismissal for cause is warranted under § F.B(1) if the Petitioner's neglect of
5 faculty duties adversely affected, in an intentional and malicious way, the ability of others to
6 carry out their academic, scholarly, or professional responsibilities. We have adopted the
7 Hearing Panel's findings that the Petitioner knowingly and intentionally engages in the
8 behaviors at issue and that he intends both the good and bad consequence of such behaviors.
9 See Finding of Fact 69. These findings comport with our definition of "intentional" as set
10 forth in Conclusion of Law 16 above. It follows from our foregoing conclusions that the
11 Petitioner's behaviors have adversely affected in an intentional way the ability of others to
12 carry out their academic and professional responsibilities.

13 57. With respect to malice, we have likewise adopted the Hearing Panel's finding
14 that "on occasion [the Petitioner] may not have formed a prior specific malice for the particular
15 person to whom he is then uttering his words." See Finding of Fact 72. This mixed finding of
16 fact and conclusion of law would suggest that while on some occasions the Petitioner did not
17 act maliciously, on other occasions he did. Additionally we have noted (without expressly
18 adopting) the Hearing Panel's conclusion that "[e]ven were the Panel not to find [the
19 Petitioner's] conduct malicious, at best the Panel could only find that his verbal acts were taken
20 with an ongoing, deliberate and reckless indifference to the impact his actions have on those
21 students and other persons who do not or cannot rise to his challenge." Panel Decision at 9.
22 On remand, we asked the Hearing Panel to reconsider this conclusion in light of our definition
23 of a "malicious" act as one that is substantially certain to cause injury and that is done without
24 just cause or excuse or in reckless disregard of the law or of a person's rights. See Conclusion
25 of Law 16 above.

1 58. The Board has not adopted the Panel's findings regarding the Petitioner's future
2 ability to adhere to the Code of Faculty Ethics based solely on his demeanor at the hearing.
3 We agree that such demeanor evidence may appropriately be considered in mitigation of a
4 more severe sanction. However, the Petitioner's demeanor has no legal bearing on whether he
5 did or did not act maliciously in the past. Moreover, while this Board must and should give
6 "due regard" to the Hearing Panel's opportunity to observe witnesses, RCW 34.05.464(4), we
7 are not bound by the Panel's findings based on credibility or demeanor evidence. Tapper v.
8 Employment Security Department, 122 Wn.2d 397, 405-06 (1993); Regan v. State Department
9 of Licensing, 130 Wn. App. 39, 59-60 (2005). We are particularly reluctant to be persuaded by
10 such evidence in this case given our factual findings relating to notice (Findings of Fact 62-66)
11 and the Petitioner's state of mind (Findings of Fact 67-72).

12 59. In accordance with Art. XVII § 4.b(3) of the Faculty Handbook, the Board
13 determined to remand this matter to the Faculty Hearing Panel for further proceedings
14 consistent with our Review Decision and Order on Remand. We based this determination on
15 our findings that (1) the procedures followed by the Hearing Panel in reaching its decision
16 were not in accordance with the Faculty Handbook's standards for the imposition of severe
17 sanctions (see Conclusion of Law 57), and that (2) our review of the record revealed the
18 importance of evidence which the Panel did not adequately consider (see Conclusion of Law
19 58).

20 60. On remand, the Hearing Panel determined that the impact of the Petitioner's
21 behavior did not adversely affect the ability of any other persons to carry out their academic,
22 scholarly, or professional responsibilities in a way that was both intentional and malicious.
23 Decision on Remand at 4-8. Although it seems apparent that reasonable minds may differ on
24 this point, we refrain in this instance from substituting our judgment for that of the Hearing
25 Panel. Because we have remanded this question to the Panel, we are prepared to accept the
26 reconsidered judgment of the Petitioner's faculty peers that he should not be dismissed for

1 cause. However, while concurring in the result, we decline to adopt the Hearing Panel's
2 conclusion that it cannot be shown on this record that the Petitioner's behaviors adversely
3 affected, in an intentional and malicious way, the ability of others to carry out their academic,
4 scholarly, or professional activities.

5 **F. Intentional and Malicious Interference Standard**

6 61. Dismissal for cause is warranted under § F.B(5) if, without regard to the Code
7 of Faculty Ethics, any of the proven facts establish that the Petitioner intentionally and
8 maliciously interfered with the academic or scholarly activities of others. For the reasons
9 discussed immediately above (see Conclusions of Law 57-59), we deferred deciding, pending
10 further review by the Hearing Panel, whether the facts establish one or more violations of the
11 intentional and malicious interference standard under § F.B(5).

12 62. On remand, the Hearing Panel did not directly consider whether the Petitioner
13 intentionally and maliciously interfered with the academic or scholarly activities of others.
14 However, the Panel concluded that the impact of the Petitioner's behaviors did not affect the
15 ability of any other persons to carry out their academic, scholarly, or professional
16 responsibilities in a way that was both intentional and malicious. Because we accept the
17 Panel's recommendation that the Petitioner should not be dismissed for cause, and because
18 sufficient grounds exist under the "neglect of faculty duties" standard to impose a severe
19 sanction other than dismissal, we find it unnecessary at this time to give further consideration
20 to the "intentional and malicious interference" standard under § F.B(5).

21 **G. Procedural Issues**

22 63. Our previous order remanding this matter for further proceedings required that
23 we address the Petitioner's continuing status pending our issuance of a final order. The
24 Petitioner's suspension with pay in October 2004, prior to the specification of charges, was not
25 a disciplinary suspension covered by the Faculty Handbook and was within the Provost's
26 authority to order in circumstances warranting caution out of justifiable concern for the safety

1 of students and others. The Provost's provision of a prompt post-suspension hearing sufficed
2 to satisfy the requirements of procedural due process.

3 64. Once charges were specified, however, the Petitioner, in accordance with the
4 Faculty Handbook, could remain suspended with pay (or assigned to other duties in lieu of
5 suspension) only if immediate harm to the Petitioner or others was threatened by his
6 continuance. Art. XVII § 2.a. The Faculty Handbook also requires the Provost within ten days
7 of specifying charges to consult with the Executive Council of the Faculty Senate concerning
8 the propriety, length, and other conditions of any suspension pending an ultimate determination
9 of the faculty member's status through the institution's hearing procedures. Id.

10 65. The Provost did consult with the faculty leadership regarding the initial
11 suspension (see RP II 72), which he was not required to do. However, the record is silent as to
12 whether or not the required consultation took place with the Executive Council concerning any
13 suspension from the time when the charges were specified. Although the matter of the
14 Petitioner's interim suspension is not the matter before us for decision, we have directed the
15 President, pending a final administrative decision in this matter, to make the appropriate
16 inquiries to determine that the University's procedures have been followed and that the
17 Petitioner remains suspended with pay, or assigned to other duties in lieu of suspension, only if
18 immediate harm to others would be threatened by his continuance.

19 66. The Petitioner raises the additional issue of whether the proceedings herein
20 should have been conducted in open session. Initially we note that the Open Public Meetings
21 Act, chapter 42.43 RCW, does not apply when the Board of Trustees meets in its quasi-judicial
22 capacity to conduct an adjudicative proceeding governed by the APA. RCW 42.43.140 (2),
23 (3). The APA itself provides that an adjudicative proceeding "is open to public observation,
24 except for the parts that the presiding officer states to be closed under a provision of law
25 expressly authorizing closure or under a protective order entered by the presiding officer
26 pursuant to applicable rules." RCW 34.05.449(5).

67. The Faculty Handbook, Art. XVII § 2.d, expressly provides that the hearing will be private, unless the Hearing Panel, in consultation with the Provost and only with the agreement of the faculty member, decides that the hearing should be public. The Handbook further provides that review by the Board of Trustees is to be conducted in executive session. Art. XVII § 4.a. We regard the Faculty Handbook's hearing procedures, as we must, as a "provision of law expressly authorizing closure" of the proceedings for purposes of RCW 34.05.449(5).

68. An independent provision of law authorizing closure or an appropriate protective order is the Family Educational Rights and Privacy Act of 1974 ("FERPA"), 20 U.S.C. § 1232g, which prohibits the unauthorized disclosure of student education records. The record herein is replete with protected education records, including numerous exhibits and extensive portions of the transcript of the proceedings. Some of these student records also contain confidential health information protected by chapter 70.02 RCW. It would have been proper for the Hearing Officer to have closed the hearing for these purposes and also to have entered a protective order prohibiting the unauthorized disclosure of confidential student information. Accordingly, the Board of Trustees has entered an appropriate protective order governing the proceedings herein.

III. FINAL ORDER

The Board of Trustees hereby AFFIRMS the recommendation of the Faculty Hearing Panel that the Petitioner be subjected to a severe sanction other than dismissal based on his serious and persistent neglect of faculty duties that adversely affected in a substantial way the ability of others to carry out their academic and professional rights and responsibilities.

1. As recommended by the Hearing Panel, the Petitioner shall be suspended without pay from all faculty privileges and duties, including teaching, for two academic quarters during the regular 2006-07 academic year. Unless stayed, the suspension shall be served during Winter and Spring Quarters.

1 2. To the extent permitted by law, the Petitioner's medical insurance benefits shall
2 be continued during the period of suspension without pay. Under rules promulgated by the
3 Washington State Health Care Authority, only employees in pay status eight or more hours per
4 month are eligible to receive the employer contribution for health insurance benefits. WAC
5 182-12-133. However, an employee on authorized leave without pay may continue insurance
6 coverage by self-paying premiums at the group rate. WAC 182-12-133(1)(f). The Petitioner's
7 suspension without pay shall be deemed an authorized leave for purposes of WAC 182-12-
8 133(1)(f).

9 3. The Board respectfully declines to adopt the Hearing Panel's recommendation
10 that the Petitioner be required to sign a statement agreeing to comply with the Code of Faculty
11 Ethics as a condition of resuming his teaching duties. All faculty members are expected to
12 comply with the Code of Faculty Ethics. We trust that the Petitioner will be held accountable
13 for any future violations of the faculty's ethical standards, whether or not he agrees to comply
14 with such standards.

15 4. The Board likewise declines to adopt the Hearing Panel's recommendation that
16 the Petitioner be required to conduct regular course evaluations as a condition of his continuing
17 employment in the future. Whether course evaluations should be required, in which courses,
18 and for what period of time, are all matters best committed to the judgment and sound
19 discretion of the University's academic administrators in accordance with the evaluation
20 procedures for tenured faculty set forth in the Faculty Handbook.

21 5. The President's Decision directed Dean Carol Edwards to take certain
22 "affirmative steps" to ensure the Petitioner's compliance with his faculty obligations, including
23 mandatory sexual harassment training to be completed during the period of suspension
24 recommended by the Hearing Panel. The President's independent directive to the Dean
25 requires no action on the part of the Board of Trustees. The Board nonetheless concurs that
26 some such training is plainly warranted on this record. In accordance with Fair Labor

1 Standards Act (FLSA) regulations, however, the Petitioner should be paid a full week's salary
2 for any week in which the required training occurs. See 5 C.F.R. § 551.423(a). The Board
3 leaves it to the administration to determine when such training should take place, whether
4 before, during, or immediately after the period of suspension without pay. If the required
5 training should take place during the period of the disciplinary suspension, the Board
6 authorizes the administration to modify the implementation of our order as necessary to
7 comply with FLSA regulations applicable to exempt employees.

8 6. The Board of Trustees hereby enters a protective order governing these
9 proceedings which shall be binding on the parties and their counsel of record and which
10 expressly prohibits the disclosure of confidential student information except as necessary for
11 purposes directly relating to these proceedings. Any further proceedings herein shall be closed
12 to public observation to the extent required to comply with this order and applicable laws.

13 7. This is a "final order" in an adjudicative proceeding under the Administrative
14 Procedure Act, chapter 34.05 RCW. As there provided, the Petitioner within ten days of
15 service of the final order may file with the Board of Trustees a petition for reconsideration,
16 stating the specific grounds upon which relief is requested. RCW 34.05.470(1). The filing of a
17 petition for reconsideration is not a prerequisite for seeking judicial review. RCW
18 34.05.470(5). A petition for judicial review must be filed and served within thirty days after
19 service of the final order. RCW 34.05.542(2). The petition must be filed and served in the
20 manner provided under RCW 34.05.514(2) and RCW 34.05.542(2), (4), and (6).

21 ENTERED at Bellingham, Washington, this 27th day of October, 2006.
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Kevin Raymond

KEVIN RAYMOND
Chair, Board of Trustees
Western Washington University

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Respondent:
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APPENDIX E

**COLLECTIVE BARGAINING AGREEMENT
BETWEEN**

**Western Washington University
and
United Faculty of Western Washington University**

JUNE 13, 2008 THROUGH SEPTEMBER 15, 2011

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SECTION 18: DISCIPLINARY ACTION/DISCHARGE

- 18.1 No faculty member shall be disciplined or discharged without just cause.
- 18.2 Except as provided in Section 18.3, the University will provide progressive discipline consisting of verbal warning, written warning, suspension without pay, and discharge. However, the University need not follow progressive discipline if the nature of the offense calls for immediate suspension without pay or discharge.
- 18.3 Progressive discipline is not required, and immediate suspension without pay, or discharge may occur for reasons which constitute just cause, such as:
 - 18.3.1 Violation of Section 13, Discrimination and Harassment Prohibited.
 - 18.3.2 Violation of Section 14, Workplace Violence.
 - 18.3.3 Serious scientific or scholarly misconduct, consisting of, but not limited to, significant misrepresentation of credentials, falsification of data, plagiarism, or abuse of confidentiality.
 - 18.3.4 Conviction of a felony.
 - 18.3.5 Malicious interference with the scientific, scholarly or academic activities of others.
 - 18.3.6 Violation of the University's drug-free work place policy.
 - 18.3.7 Engaging in a strike.
- 18.4 The University may suspend a faculty member with pay pending investigation of an allegation. The Union will be notified of any such suspension.
- 18.5 Progressive discipline consisting of verbal warning or written warning will be administered by the dean
 - 18.5.1 A dean may recommend to the Provost suspension without pay or discharge. The Provost may initiate suspension without pay or discharge in writing. Written notice of suspension without pay or discharge will be given to the faculty member.
- 18.6 Disciplinary Procedures
 - 18.6.1 Informal meetings between the University and faculty regarding workplace issues are encouraged
 - 18.6.2 If prior to, or during, a meeting between the University and a faculty member, the faculty member reasonably concludes that discipline could result, the faculty member shall be entitled to representation by the union. If necessary, the meeting may be suspended for a reasonable time to obtain representation. All disciplinary meetings shall be conducted in private. Settlements reached in cases where the faculty member has chosen to waive the right to union representation shall be non-precedent setting.
 - 18.6.3 Faculty shall be given a fair and reasonable opportunity to respond to complaints which could result in discipline.

SECTION 19 APPEAL PROCEDURE IN SUSPENSION WITHOUT PAY AND DISCHARGE

- 19.1 At any step in this Section 19, the decision maker may confirm, reverse or modify the discipline, and may order the payment of back pay to the faculty member.
- 19.2 Within 5 days of being notified in writing of suspension without pay or discharge and the reasons for the decision, the faculty member may make a written request to the Provost or his or her designee to review the decision, and may submit documentation in support of that review. The faculty member may also suggest to the Provost the names of persons with whom the Provost may want to speak. Within 30 calendar days of receiving the request from the faculty member to review the decision, the Provost shall provide a copy of his/her written decision to the faculty member.
- 19.3 Within 5 days of receipt of the Provost's decision, the faculty member may make a written request to the President of the University to review that decision and the materials considered by the Provost. The President shall notify the faculty member in writing within 20 days of that request.
- 19.4 Within 5 days of receipt of the President's decision, the faculty member may appeal the decision in accordance with this Section.
 - 19.4.1 Upon request of the faculty member, the Board of Trustees shall appoint an Appeals Committee. The Appeals Committee will be comprised of three faculty members appointed by the Union and three non-faculty members appointed by the Board, plus the committee chair. The committee chair will be jointly selected by the UFWW President and the Board of Trustees' Chair. The cost of the committee chair, if any, will be shared by the UFWW and the University. The committee chair will convene and chair the hearing and will vote in case of a tie.
 - 19.4.1.1 In the case of a tie vote, both the UFWW Executive Committee and the Board of Trustees will have the opportunity to meet with the committee chair, review the case, and make comment prior to the chair making the final decision.
 - 19.4.2 The responsibilities of the Appeals Committee shall be:
 - 19.4.2.1 To review the materials submitted to the President related to the proposed discipline or discharge.
 - 19.4.2.2 To call and or examine any witnesses, including witnesses suggested by the parties.
 - 19.4.2.3 To consider oral or written arguments from the faculty member and the University.
 - 19.4.2.4 To arrive at its decision on the basis of the hearing and the materials submitted.
 - 19.4.2.5 The chair and the committee:
 - 19.4.2.5.1 Have no authority to rule contrary to, add to, subtract from, or modify any of the provisions of this

Agreement, and shall confine the decision solely to the application or interpretation of the express terms of the Agreement.

19.4.2.5.2 Are limited in their decision to the grievant's issue(s) set forth in the original written grievance unless the Parties agree to modify it.

19.4.2.5.3 Shall not make any award that provides a faculty member with compensation greater than that which would have resulted had there been no violation of this Agreement.

19.4.3 The hearing shall be held within fifteen days of the appointment of the Appeals Committee and shall be private.

19.4.4 As soon as reasonably practicable, but in no event longer than thirty calendar days after conclusion of the hearing, the written decision of the committee will be presented to the President, the Board of Trustees, the affected faculty member and the Union.

19.4.5 The decision of the Appeals Committee shall be final and binding.

19.4.6 If the decision of the Appeals Committee is to overturn the suspension without pay or the termination, the university will reinstate the faculty member with full back pay reduced by any interim earnings.

19.5 At any step in the process the faculty member may request and may have the assistance of a local Union representative.

SECTION 20 GRIEVANCE AND COMPLAINT PROCEDURES

20.1 Purpose

The purpose of this procedure is to provide a process for the prompt and fair resolution of grievances and complaints.

20.2 Definitions

20.2.1 Grievance: A grievance is a claim by a faculty member or the Union against the University regarding the interpretation or application of the terms of this Agreement. A grievance must arise during the term of this Agreement in order to be processed pursuant to the procedure in this Agreement. This Section supersedes and replaces any Faculty Handbook grievance procedure.

20.2.2 The following are not grievable:

20.2.2.1. Complaints as defined in Section 20.2.3, below.

20.2.2.2 Matters arising under Section 18 Disciplinary Action and discharge.

20.2.2.3 Tenure, promotion, merit, or evaluation decisions for all faculty where the disagreement is based on whether standards are satisfied.